JAPAN

I. INTRODUCTION

1. Legal Framework

1.1. The Constitution

Japan has a population of around 126 million. There is a small minority of Ainu, as well as a number of foreign residents including Koreans, Chinese, Brazilians, Americans and Peruvians.[1]

After the Second World War, large-scale legal reforms took place on the initiative of the Allied Forces. The present Constitution, adopted in 1946, is based on a draft prepared by the Allied Forces, and provides for a constitutional monarchy. Chapter III, which consists of 31 articles, sets out the rights and duties of the people. Civil and political rights, such as the right to life, freedom from arbitrary arrest and detention and the right to a fair trial as well as economic and social rights are guaranteed.[2] There is also an absolute prohibition of torture from which no derogation is possible[3] and a stipulation that confessions made under torture are inadmissible.[4] The Constitution also guarantees the right of access to court (Article 32), the right of "peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters" (Article 16) and the right to "sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official." (Article 17)

The judiciary is composed of the Supreme Court, 8 high courts, 50 district and family courts and 438 summary courts. The district courts are the courts of first instance in criminal, civil and administrative matters. A party to the proceedings may appeal a judgment to the High court, and then to the Supreme Court. The Supreme Court is not only the final court of appeal, it also has the mandate to determine the constitutionality of any law, ordinance or administrative decision.[5]

The Constitution provides that all judges are independent in the exercise of their

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[1] See for general information on Japan: Core Document forming Part of the Report of State Parties: Japan, UN Doc. HRI/CORE/1/Add.111, 11 December 2000.

[2] See Articles 10-40 of the Constitution.

[3] Article 36 of the Constitution. There is no emergency legislation in Japan however the Japanese government has stated, in its fourth periodic report to the Human Rights Committee in respect of its obligations under the ICCPR: "(a) In the legislation referring to public emergency, there is no provision which restricts fundamental human rights; (b) In Japan, in case of emergency, necessary measures would be taken consistent with the Constitution as well as the Covenant", see Fourth periodic reports of States Parties due in 1996: Japan. 01/10/97, CCPR/C/115/Add.3, para.59.

[4] Article 38 of the Constitution, see for text infra II.

[5] Article 81 of the Constitution.

authority and that they are bound only by the Constitution and related laws.[6]

1.2. Incorporation and status of international Law in domestic Law

Japan has ratified the following relevant international treaties:

- Geneva Conventions (Acceded Geneva Conventions I, II, III and IV on 21 April 1953; Japan has not acceded to any of the additional Protocols);
- International Covenant on Civil and Political Rights (Ratified on 21 June 1979; no declaration under Article 41; Japan has not acceded to the Optional Protocols);
- International Covenant on Economic, Social and Cultural Rights (Ratified on 21 June 1979 with reservations on Article 7(d), 8(1)(d) and 13(2)(b)(c));
- Convention relating to the Status of Refugees (Acceded on 3 October 1981; Japan has also acceded the Protocol relating to the Status of Refugees on 1 January 1982);
- Convention on the Elimination of All Forms of Discrimination against Women (Ratified on 25 June 1985);
- Convention on the Rights of the Child (Ratified on 22 April 1994);
- International Convention on the Elimination of All Forms of Racial Discrimination (Acceded on 15 December 1995, with a reservation to article 4);
- Convention against Torture (Acceded on 29 June 1999; Japan has made a declaration under Article 22 (but not under Article 21).

Article 98 of the Constitution provides that: "1. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial prescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity; 2. The treaties concluded by Japan and established laws of nations shall be faithfully observed."

The courts, the government and the majority of scholars take the view that treaties become part of domestic legislation upon ratification and promulgation and that treaties and customary international law rank higher than statutory law.[7] The rank that is accorded to treaties and customary international law *vis-à-vis* the Constitution is less clear. The government has taken the position that "since the Constitution can be interpreted as covering the same range of human rights as that of the Covenant, as outlined above, there can be no conflict between the Constitution and the Covenant."[8] This would arguably require that the fundamental rights enshrined in the constitution be construed in light of applicable international human rights standards.

[6] See Articles 76 et seq. of the Constitution.

[7] Treaties are to be ratified by the Cabinet (Article 73(3)) and to be promulgated by the Emperor (Article 7(1)). The courts have interpreted Article 98(2) as follows: "treaties are incorporated as one form of the national legislation by ratification and promulgation and without adopting particular legislation, and [that] treaties have effects superior to statutes." Tokushima District Court, 15 March 1996, *Hanreijihou* 1597-115. See also, Tokyo High Court, 3 February 1993. However, the acknowledgement of the self-executing force of some treaty provisions in its 1998 report to the Human Rights Committee, supra, appears to be inconsistent with the view of the government taken in the Fukushima High Court in 1994, when it argued that the ICCPR as a whole was not "self-executing," Fukushima High Court, 21 February 1994, 84 Hanreitaimuzu 147, 154. See also, Yuji Iwasawa, International law, Human Rights, and Japanese Law, Clarendon Press, Oxford 1998.

[8] Fourth Periodic Report to Human Rights Committee, supra.

Provisions of the International Covenant on Civil and Political Rights (ICCPR) have in several cases been invoked before Japanese courts although the courts appear to be reluctant to rely upon them in order to find a breach of international human rights standards.[9] The Tokyo High Court held that rules of customary international law could be directly applied in Japanese courts provided that they are sufficiently precise to allow for their application.[10]

2. Practice of torture: Context, Occurrence, Responses

2.1. The practice of torture

There are no recent examples of state-sponsored torture though Japanese troops are reported to have engaged in torture and other large-scale human rights violations during the Second World War, particularly those troops stationed in China, Korea and other South East Asian countries.[11]

At present, there are less reported cases of physical torture, as compared to the reported instances of mental torture and/or ill-treatment. The typical perpetrators of these acts have been police and prison officials as well as immigration officers and staff of psychiatric hospitals. The victims have mainly been detainees, either in police custody or prisons, foreign nationals and patients of psychiatric hospitals. Torture and ill-treatment appear to be used mainly as a means to extract confessions, often in 'substitute cells' (*Daiyo Kangoku*) used in pre-trial detention.[12] The Japanese criminal justice system relies heavily on confessions as the primary evidence to secure convictions.[13] There have also been numerous allegations of violence and sexual

[9] Iwasawa, supra, p. 52. Courts have been criticised for their handling of such cases since the findings of a violations are relatively low as compared to the number of cases in which a violation had been alleged. "It can not be denied that, in general, judges in Japan have a negative attitude to apply international human rights law," Abe-Imai, *Textbook Kokusai Jinkenhou*, p.36-; Abe; *Jinken no Kokusaika*, p. 298.

[10] Iwasawa, supra, p. 78. For example, the case concerning the costs for an interpreter of a foreign defendant, Tokyo High Court, 3 February 1993; the state compensation case claimed by a Korean national who was arrested because of having rejected fingerprinting, Osaka High Court, 28 October 1994, Hanrei jihou 1513, p.71. See also the case by Takamatsu High Court, 25 November 1997 explained below. Yet, there is no single case by the Supreme Court which may become a leading case in this field. For example, the judgment of Tokushima District Court of 15 March 1996 and the Takamatsu High Court (25 November 1997) is known for its innovative aspects, which admitted the direct applicability of the international covenants and further stated that the European Convention of Human Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which is not a treaty, can be used as standards in interpreting the provisions of the International Covenants. The plaintiff in this case was a convicted prisoner, who suffered damage as a result of prison officers' violence. He was also restricted in meeting with his attorney without interference to prepare for the judicial action in pursuit of state compensation. He claims that such restriction by the prison authority was in violation of Article 14(1) of the ICCPR. Although it was a significant judgment, the plaintiff lost the case at the Supreme Court, see for details CPR News Letter, No.17, article by Y. Kitamura, p.7.

[11] See the homepage of the Global Alliance for Preserving the History of WWII in Asia for an overview of organisations working on the issue and for further references, at http://www.gainfo.org/related.html.

[12] The 'substitute prison system' (*Daiyo Kangoku*), which may include torture chambers used to extract confessions, still exists, even though the government has acknowledged the serious flaws in the system and has indicated that such cells "shall not be used as jails in the future." Japan Federation of Bar Associations (JFBA), *Abolish "Daiyo-Kangoku - Japan Police Custody System" Now*, 1999, pp.3-4. There are no laws specifically restricting the manner or time of interrogation.

[13] It is said that a variety of coercive methods to obtain confessions are used: "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

harassment of detainees in respect of immigration procedures, including harsh conditions of (often prolonged) detention, the use of handcuffs, the use of restraining devices, and detention in isolation rooms. Detainees of the Landing Prevention Facilities (*Jouriku Boushi Shisetsu*) located in the airport complex have reportedly been held in windowless cells for weeks without exercise. Security staff in charge of the Facilities, who belong to private security agencies, are known to have beaten a number of foreign nationals.[14]

2.2. Domestic Responses

There are two human rights bodies, the Civil Liberties Commission and the Legal Affairs Bureau of the Human Rights Division in the Ministry of Justice (LAB),[15] both of which are affiliated with the Ministry of Justice. In response to the critical observations of the UN Human Rights Committee regarding the lack of independence of the Civil Liberties Commission,[16] the government proposed a Bill for human rights protection (*Jinkenyougo-houan*) to the Diet in March 2002. This followed a report by the Council for Human Rights Protection, a ministerial advisory panel in 2001. The nature and powers of the Human Rights Commission (*Jinken-iinkai*) proposed in the Bill have been criticised for the apparent lack of independence of the Commission.[17]

The Japanese government has publicly dismissed claims about present allegations of torture and ill-treatment[18] and about problems with the system of 'substitute prisons.'[19]

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position; shouting close to his ear that he has committed the crime; inducing the suspect 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." JFBA, *Abolish "Daiyo-Kangoku - Japan Police Custody System" Now,supra,, pp.7-8.*

[14] Amnesty International, Welcome to Japan?, May 2002, AI INDEX: ASA 22/002/2002, pp. 1-2. See also on a recent case of torture in the Nagoya Prison, Amnesty International, Japan: prison abuses must stop, November 2002, AI INDEX: ASA 22/009/2002.

[15] Ordinance on the Legal Affairs Bureau, Art. 2, Rules of the Legal Affairs Bureau and the district Legal Affairs Bureau Art.17(1)(iv). See for a detailed explanation of the mandate and work of these organs, the Fourth Periodic Report of Japan to the Human Rights Committee, supra, paras.12 et seq.

[16] Concluding observations of the Human Rights Committee: Japan. 19/11/98, Consideration of Reports submitted by states parties under Article 40 of the Covenant, Human Rights Committee, UN Doc. CCPR/C/79/Add.102, para.9.

[17] The reasons are, for example, that the Human Rights Commission is an external organ of the Ministry of Justice (Art 5(2) of the Bill for Human Rights Protection), that the Secretariat of the Human Rights Commission is not staffed by independent professionals but with officers from the Human Rights Bureau of the Ministry of Justice, and that the Commission cannot make an independent proposal for its budget and does not have the authority to recruit its own staff. See on the proposed Human Rights Commission, which had not been established in late 2002, Amnesty International, Japan, Serious Concerns over human rights bill, November 2002, Index: ASA 22/008/2002

[18] See on this point Amnesty International, Ill-Treatment of Foreigners in Detention: Comments by the Japanese Government, May 1998, AI Index: ASA 22/02/98 and for responses to past abuses, infra V.

[19] Minister of Justice, Takao Jinnai: "The substitute prison is the place where a police official which does not belong to a branch of the police dealing with investigation, conducts treatments of suspects in accordance with relevant laws such as the prison law, paying attention to human rights on his responsibility and decision. Thus, I believe that there is no apprehension that detention of suspects in the so-called substitute prison may be used improperly during investigation. Therefore, I do not consider that detaining suspects in the substitute prison may cause the acts of torture or related crime or may cause the possibility of torture or related crime;" and Tsuyoshi Noda, Minister of Home Affairs, Head of National Public Safety Commission: "I consider that it is obvious that detainees in the substitute prison should not be inflicted upon by torture or other crimes. In the police, it has been provided that a detention officer who does not belong to a branch conducting investigation is to treat detainees, and the police have been treated detainees paying attention to human rights until now and are determined to continue making efforts for this," in statements made at the 145th plenary session of the House of Representatives, 22 April 1999.

Even so, the government has taken some limited practical steps to tackle instances of ill-treatment and to strengthen the rights of victims. In response to criticism by the Human Rights Commission concerning the lack of adequate human rights training for law-enforcement officers,[20] the government prepared a domestic action plan (4 July 1997) concerning the United Nations Decade for Human Rights Education. The action plan identifies a number of categories of officials, such as officials from the public prosecution service, correctional institutions, rehabilitation offices, the immigration authority and related offices as "the persons who engage in the particular occupations deeply related to human rights".[21]

2.3. International Responses

In its response to the fourth periodic report of Japan, the Human Rights Committee expressed its concerns with several issues related to torture and ill-treatment. In particular, the Committee was concerned that there is no independent authority to which complaints of ill-treatment by the police and immigration officials can be addressed for investigation and redress.[22] In respect of the prison system, the Human Rights Committee expressed their deep concerns with the following: "(a) Harsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy; (b) Use of harsh punitive measures, including frequent resort to solitary confinement; (c) Lack of fair and open procedures for deciding on disciplinary measures against prisoners accused of breaking the rules; (d) Inadequate protection for prisoners who complain of reprisals by prison wardens; (e) Lack of a credible system for investigating complaints by prisoners; and (f) Frequent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment."[23]

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The prohibition of torture is stipulated in the Constitution. Article 36 of the Constitution reads: "The infliction of torture by any public officer and cruel punishments are absolutely forbidden." Article 38(2) states: "Confessions made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence." However, there is no statutory prohibition of torture, no specific criminal offence of torture and torture has not been defined in domestic law.

While the Supreme Court has not defined torture in its jurisprudence, it has defined the term cruel punishments as "punishments which are recognized as inhumanely cruel and cause an unnecessary, mental or physical pain".[24] The Court has in several cases

[20] Concluding observation of the Human Rights Committee, Japan, 19/11/98, UN Doc. CCPR/C/79/Add.102 (1998), para 32.

[21] For more details and current progress, visit http://www.kantei.go.jp/jp/singi/jinken/.

[22] Concluding observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.102, 19 November 1998, para.10.

[23] Ibid., para.27.

[24] Supreme Court, ***Saikousaibansyo Keijihanrei-syu*** (Case Book of Criminal Trial at Supreme Court), 2-7-777, 1948.6.30.

considered the question of whether the death penalty itself, certain methods of its execution and/or the 'death row phenomenon' constitute "cruel punishment."[25]

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal Offences and Punishment

In the absence of a specific criminal offence of torture, acts of torture might be prosecuted in accordance with articles 195 and 196 of the Japanese criminal code. Article 195 stipulates:

> 1) When a person performing or assisting in judicial, prosecutive, or police activities,[26] in the performance of his duties, commits an act of violence or cruelty against the defendant in a criminal action or against another person, imprisonment at forced labour or imprisonment for not more than seven years shall be imposed;
> 2) The same applies when a person who is guarding or escorting another confined in accordance with law or ordinance commits an act of violence or cruelty against him.[27]"

Article 196 states: "A person who commits a crime provided in the preceding two Articles and thereby kills or injures another shall be subject to the punishments provided for the crimes of bodily injury if they (note: such punishments) be graver."

The phrase "Act of violence" (*Boukou*) in article 195 has been interpreted as material or physical assaults but not necessarily a direct harm to a person's body, causing bad health, and includes acts such as tearing up the clothes being worn by a person.[28]

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[25] Japan maintains the death penalty in accordance with its Constitution, Article 31, and Penal Code, Articles 9 and 11. In a leading case, the Supreme Court held that the death penalty does not constitute "cruel punishment." Supreme Court, ***Saikousaibansyo Keijihanrei-syu***, 2-3-191, 1948.3.12. In another case, the Court decided that hanging (Art.11 PC) as a method of execution does not constitute "cruel punishment" but burning, crucifixion, exposing a cut-off head to the public and boiling in a cauldron do constitute cruel punishments. Supreme Court, ***Keishu*** 9-4-663, 1955. 4. 6. With regard to the 'death row phenomenon,' the Supreme Court held that it does not consider it to be cruel punishment even if the death penalty is executed after spending 30 years on death row, Supreme Court, ***Hanreijihou*** 1158-28, 1985.7.19. There has been no considerable development of the jurisprudence from these judgments.

[26] The phrase "a person performing or assisting in judicial, prosecutive, or police activities" in Article 195(1)/196 relates to a person who fits the following conditions: As a general rule, the person shall be a public officer. Article 7 of the Penal Code defines "public officer" as "a government official, a local government official, and a member of assembly or committee, or other employee engaged in the performance of public duties in accordance with laws or ordinances." Furthermore, the person needs to have the authority to arrest or confine persons. The phrase "a person who is guarding or escorting another confined in accordance with law or ordinance" in Article 195(2) connotes guarding or escorting on duty and includes a person who supervises the duties of the person guarding or escorting. "Person" in Article 195/196 includes police officers, officers of prison and immigration centres; however it has not been fully clarified whether personnel of mental institutions, medical officers at Medical Prisons, and personnel of Juvenile Classification Homes fall within the scope of the term "person" under Article 195/196.

[27] Translation was taken from the Japanese Ministry of Justice, Constitution of Japan and Criminal Statues, University Publications of America; INC., 1979.

[28] See the decision by Tokyo District Court, 1958.12.16; ***Koutousaibansyo Keijisaiban Tokuhou*** 5, addendum 556; Tokyo High Court, 1955.7.20; ***Tokyo Koutou Saibansyo Keiji Hanketsu Jihou***, Case Report of Criminal Trial at Tokyo High Court), 6-8-249.

The term "Act of cruelty" (*Ryugyaku*) has been defined as any act that causes physical or mental pain in addition to those constituting "acts of violence."[29]

Perpetrators of torture or ill-treatment may also be prosecuted for other crimes, such as the infliction of bodily injury,[30] death resulting from bodily injury,[31] violence,[32] bodily injury through negligence,[33] including through negligence in the conduct of one's profession,[34] death or bodily injury resulting from unlawful arrest or false imprisonment[35] and homicide.[36] Moreover, the criminal offences of intimidation[37] and compulsion[38] arguably allow for the prosecution of certain acts of mental torture and ill-treatment.

The offences of sexual harassment[39] and rape[40] carry a minimum punishment of two years imprisonment, and three years if resulting in the death of the victim.

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[29] See, e.g. the former Superior Court [*Daishinin*], 1915. 6. 1.

[30] Article 204 PC (Bodily Injury): "A person who inflicts a bodily injury upon another shall be punished with imprisonment at forced labour for not more than 10 years or a fine of not more than 300,000 yen or a minor fine."

[31] Article 205 PC (Death Resulting from Bodily Injury): "(1) A person who inflicts a bodily injury upon another and thereby causes his death shall be punished with imprisonment at forced labour for fixed term of not less than two years."

[32] Article 208 PC (Violence): "When a person uses violence against another without injuring him imprisonment at forced labour for not more than two years or a fine of not more than 300,000 yen, penal detention or a minor fine shall be imposed."

[33] Article 209 PC (Bodily Injury through Negligence): "(1) A person who inflicts a bodily injury upon another through negligence shall be punished with a fine of not more than 300,000 yen or a minor fine.(2) The crime provided in the preceding paragraph shall be prosecuted only upon complaint." Article 210 (Death through Negligence): "A person who causes the death of another through negligence shall be punished with a fine or not more than 500, 000 yen."

[34] Article 211 PC (Death or Bodily Injury through Negligence in the Conduct of Occupation): "A person who fails to use such care as is required in the conduct of his profession or occupation and thereby kills or injuries another shall be punished with imprisonment for not more than three years or a fine of not more than 500,000 yen. The same applies to a person who by gross negligence injures or causes the death of another."

[35] Article 220 (1) PC (Arrest and Imprisonment): "A person who unlawfully arrests or confines another shall be punished with imprisonment at forced labour for not less than three months nor more than five years"; Article 221 PC (Death or bodily injury resulting from unlawful arrest or false imprisonment): "A person who commits a crime provided in the preceding Article and thereby kills or injures another person shall be dealt with the punishments provided for the crimes of bodily injury if they be graver."

[36] Article 199 PC (Homicide): " A person who kills another shall be punished with death or imprisonment at forced labour for life or for not less than three years."

[37] Article 222 PC (Intimidation): "A person who intimidates another through the threat of injury to his life, person, liberty, reputations, or, property, shall be punished with imprisonment at forced labour for not more than two years or a fine of not more than 300,000 yen."

[38] Article 223 PC (Compulsion): "(1) A person who by intimidating another through a threat of injury to his life, person, liberty, reputation, or property or by the use of violence causes such person to perform an act which he is not bound to perform or hinders him in the exercise of a right to which he is entitled, shall be punished with imprisonment at forced labour for not more than three years. (2) The same applies to a person who, by intimidating another person through a threat of injury to the life, person, liberty, reputation, or property of a relative of such person, causes the performance of an act which he is not bound to perform or hiders him in the exercising of a right to which he is entitled. (3) Attempts of the crimes provided in the preceding two paragraphs shall be punished."

[39] Article 176 PC (Indecency through Compulsion): "A person who, through violence or intimidation, commits an indecent act with a male or female person of not less than 13 years of age shall be punished with imprisonment at forced labour for not less than six months nor more than seven years. The same applies to a person who commits an indecent act with a male or female person under 13 years of age."

[40] Article 177 PC (Rape): "A person who, through violence or intimidation, has sexual intercourse with a female person of not less than 13 years of age commits the crime of rape and shall be punished with imprisonment at forced labour for fixed term of not less than two years. The same applies to a person who has sexual intercourse with a female person under 13 years of age." Article 178 PC (Constructive Compulsory Indecency and Rape): "A person who commits an indecent act or has sexual intercourse with another by taking advantage of loss of consciousness or inability to resist, or

The disciplinary system for government officials[41] is set out in the National Public Service Law and the Rule of National Personnel Authority (*Jinjiin Kisoku*).[42] There are four types of disciplinary sanctions - dismissal, suspension, salary reduction, and warning. These sanctions are carried out by the individual who appointed the official concerned at his/her discretion or, if he/she fails to do so, by the National Personnel Authority. Sanctions may only be imposed if the official acted in breach of his/her official duties, either with intent or negligence. Disciplinary procedure may be instituted and carried out in parallel with any criminal proceedings.[43]

2. The procedural law

2.1. Immunities

Public officers are not immune from criminal responsibility for acts of torture.

2.2. Statutes of Limitation

The period of limitation depends on the prescribed punishment. The period is 15 years for offences punishable by death (Article 199 CC), 10 years for offences punishable by imprisonment at or without forced labour for life (Article 181 CC), seven years for offences punishable by imprisonment at or without forced labour for a maximum term of not less than 10 years (Article 177, 205 CC), five years for offences punishable by imprisonment at or without forced labour for a maximum term of under 10 years (Articles 195, 204 CC), three years for offences punishable by imprisonment at or without forced labour for a maximum term of under five years (Articles 208, 211, 222, 223 CC) or with a fine and finally one year for offences punishable by penal detention or a minor fine (Article 209 CC).[44] Acts of torture are normally subject to statutes of limitation of three to five years and seven to ten years for bodily injury or rape resulting in serious injury or death.

2.3. Investigations

2.3.1. Criminal Investigations

by causing a loss of consciousness or inability to resist, or by causing a loss of consciousness or inability to resist, shall be punished in the same way as in the preceding two Articles. Article 181 PC (Death or Injury Resulting from Rape): "A person who commits a crime provided in Articles 176-179 and thereby kills or injures another shall be punished with imprisonment at forced labour for life or for not less than three years."

[41] As defined in Article 2 of the Law of Government Officials.

[42] Article 82 of the National Public Service Law is said to "impose sanctions due to violation of officials' duties in order to keep discipline and order at performance of official duties", Sonobe and others, ***Kokkakoumuin Hou***, 1997, p.174.

[43] Article 85 of the Law of Government Officials.

[44] See Article 250 Criminal Procedure Code (CCP). Translations were taken from EHS Law Bulletin Series, The Code of Criminal Procedure & The Law for Enforcement of the Code of Criminal Procedure of Japan, 1995, *Eibun-Horei*, Inc.

Victims of torture or ill-treatment may file a complaint to the prosecutor or the judicial police.[45] Legal representatives and the relatives of the victim have the right to lodge complaints independently.[46] The complaint or accusation can be submitted orally or in writing.[47] The complaint may be filed within six months from the day the offender was known.[48]

Judicial police officers and prosecutors are competent to investigate criminal offences.[49] A public prosecutor has the sole power to file an indictment[50] and may give directives regarding the investigation to judicial police officers.[51] There are no independent agencies entrusted with the task of investigating allegations of human rights abuses by public officials.

When a judicial police officer receives a complaint or accusation, the officer must promptly forward the documents and evidence related to the case concerned to a public prosecutor.[52] Police officers and prosecutors have wide discretion in deciding whether to open an investigation.[53] In practice, an investigation will not be taken forward if there is insufficient *prima facie* evidence, but the law provides no clear guidance on this. There is no system in place to review a decision not to proceed with an investigation. If an investigation is instituted, the suspect may be detained under certain conditions.[54] As part of an investigation, a public prosecutor or judicial police officer may request the court to order a specialist to examine the victim and give expert evidence.[55] When a body of a person who has died an unnatural death or is suspected of having died such a death has been found, the competent public prosecutor is obliged to inspect and examine the body.[56]

Upon completion of the investigation, a public prosecutor may decide not to proceed with the indictment on the basis of the personal character, age or situation of the offender, the gravity of the offence, the circumstances under which the offence was committed, and/or the conditions subsequent to the offence.[57] In taking this decision,

[45] Articles 230 and 241 CCP. Upon lodging a complaint, legal aid might be provided for victims of crime by the private foundation, "***Houritsu Fujyo Kyoukai***"

[46] Article 231 CCP. Also, a public officer is obliged to report any information learned in the performance of his/her duty that indicates that an offence has been committed (Article 239 (2) CCP).

[47] Article 241 CCP.

[48] Article 235 CCP.

[49] See Articles 189 (2) and 191 (1) CCP.

[50] Article 247 CCP.

[51] Article 193 CCP.

[52] Article 242 CCP.

[53] Dai**- *Konmentaru Keiji Sosyouhou***, Seirinsyoin 1999, p.40, 91.

[54] When there is sufficient ground to suspect that he/she has committed a crime and the case falls under any one of the following: if he/she has no fixed dwelling; if there is reasonable ground to suspect that the accused may destroy evidence; where the accused escapes or there is reasonable ground to suspect that he may escape. The detention of the accused requires a warrant of detention issued by a judge. See Articles 60, 61 and 207 CCP.

[55] Article 223 (1) in conjunction with Article 225 (1) CCP.

[56] Article 229 (1) CCP.

[57] Article 248 CCP.

such factors as apologies to the victim or other demonstrable examples of repentance or the progress of restitution and compensation to the victim may weigh in favour of not indicting the alleged perpetrator. The seriousness of the harm and the impact of the crime on the victim may also be taken into account in deciding whether to proceed with an indictment.[58]

While there is no comprehensive review system concerning measures and decisions taken by the investigating authorities, certain mechanisms have been introduced to exercise some form of control and to prevent unfair decisions in cases of non-indictment. For instance, the prosecutor must give notice of the decision not to prosecute to the person who has lodged the complaint or filed the accusation.[59] There is also a Committee for the Inquest of Prosecution (CIP) that was established under the Law on the Inquest of Prosecution in 1949.[60] The CIP may initiate review proceedings either upon request by a citizen or on its own initiative and is empowered to request prosecutors to submit materials and provide explanations. It may issue a recommendation for prosecution, however its decisions do not have binding power.

If a public official is charged with crimes relating to the exercise of his/her functions, including acts of violence, the person who brought the complaint or accusation of abuse of power may apply to a district court to initiate proceedings in accordance with the so-called quasi-protection procedure.[61] If the court finds the application well-founded, the case will be committed to the competent district court for trial.[62] In such a case, an attorney designated by the court will take the place of the public prosecutor.[63]

There are no effective measures for the protection of victims, their families, and witnesses or that provide for their special needs. In 2000, a new law for the protection of victims of crime and witnesses was adopted[64] and the Criminal Procedure Code was amended,[65] lifting the six months time limit for lodging formal complaints of rape; allowing victims to testify behind a screen and providing victims with an opportunity to make statements in court.

2.3.2. Investigations by Human Rights Bodies

The Civil Liberties Commission (CLC) provides advice on human rights and investigates cases of alleged infringements of human rights.[66] It has the power to receive complaints

[58] See Koichi Hamai, Tamaki Yokochi, Kazuya Okada, Ministry of Justice, Japan: "Victims of Crime in Criminal Justice in Japan: A Comprehensive Study of Victims' Views on Offenders and Criminal Justice System and Offenders' Views on Victims." http://www.aqpv.ca/diffusion/textes/defgh_t/Hamai_Yokochi_Okada.pdf.

[59] Article 260 CCP.

[60] It consists of 11 members selected at random, who serve for one year.

[61] Article 262 CCP.

[62] Article 266 (2) CCP.

[63] Articles 267, 268 CCP. See also, Hata & Nakagawa, supra, 142.

[64] Law concerning Measures Accompanying Criminal Proceedings to Protect Crime Victims, May 2000.

[65] See 157 (2)-(4) CCP.

[66] Article 2 Law of Civil Liberties Commission.

from victims and to take a number of measures aimed at obtaining redress, such as collecting information and undertaking investigations, reporting to the Minister of Justice and issuing recommendations to relevant authorities in cases of human rights violations.[67]

The Legal Affairs Bureau may receive cases from the CLC or from any other source, including direct complaints from victims. It has a range of powers including the ability to lodge claims under the Code of Criminal Procedure[68] and to find a violation.[69] The Legal Affairs Bureau can report its findings to the relevant government or public offices, and take appropriate measures to help the victims and to recommend action to be taken in respect of the violation, such as mediation or the imposition of sanctions against the offender(s).[70]

The Japanese Bar Association has set up an internal committee for receiving allegations of human rights violations and conducting investigations. However, the Committee's investigative powers are limited. The measures the Committee may take are also restricted, and are limited to the issuance of warnings and recommendations.

2.4. Trials

If the Committee for the Inquest of Prosecution (CIP) indicts or refers a case to the Court, the courts of first instance, either the district courts or the summary courts for lesser offences, in the area where the offence occurred or where the accused resides or is present, will be competent to try the accused.[71] Criminal procedure combines inquisitorial and adversarial features.[72] The defendant is presumed innocent and the burden of proof rests on the prosecution.[73] There are special arrangements for crime victims and their families to attend trials. Victims are given certain procedural rights, such as the right to proffer evidence and to state their opinions at the end of the taking of the evidence.[74] The court is not restricted in the evaluation of the credibility of evidence.[75]

Judges have discretionary sentencing powers and the execution of the sentence may be suspended if warranted by special circumstances.[76] Amnesties may be granted according to the Amnesty Law of 1947.[77]

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[67] Article 11, ibid.

[68] Article 12(1).

[69] Article 12 (1)- (2) ibid.

[70] See Article 12 (1), (3) and (6) ibid.

[71] Article 4 CCP.

[72] See for the various stages of the trial Articles 291 to 342 CCP.

[73] Supreme Court, ***Keishu*** 29-5-177, 1975.5.20.

[74] See Article 2 of the Law concerning Measures Accompanying Criminal Proceedings to Protect Victims of Crime and Article 292 (1) CCP respectively.

[75] Article 318 CCP.

[76] See Chapter IV and V Penal Code for suspended sentences and paroles. See for suspension of the execution of sentences Articles 480 and 482 CCP.

3. The Practice

3.1. Complaints

Victims of torture and ill-treatment have occasionally lodged complaints against the perpetrators. The statistics of the Legal Affairs Bureau show that there have been several hundred complaints relating to allegations of human rights violations by public officials on duty each year, though only a small number were lodged against police and prison officers.[78] There are no statistics for complaints lodged to the police or the public prosecutor. Also, the number of torture and ill-treatment cases which were dealt with as ordinary crimes of bodily injury or violence is not known.

The number of complaints lodged by persons while detained is extremely low. This is apparently due to the difficulties in lodging complaints and those who complained have reportedly faced punitive treatment at the hands of prison officials.[79] Foreign nationals held in Landing Prevention Facilities who had been ill-treated by immigration authorities have reportedly been denied access to consular officials and to register complaints with the police.[80]

3.2. Investigations

There is no available data as to the number of investigations opened into allegations of torture and ill-treatment. As there is no independent body charged with investigating such offences, REDRESS has been advised that the police are seen to be reluctant to take vigorous steps in light of a protective police culture. While there have not been many vigorous investigations and prosecutions by the office of the public prosecution, it has recently arrested prison officials in a case of alleged mistreatment of a prisoner.[81]
While the quasi-prosecution procedure (Art.262 CCP) and the work of the Committees for the Inquest of Prosecution (CIP) provide for some form of control, these mechanisms have not ensured that investigations are carried out thoroughly. From 1949 to 2001, the CIP had recommended prosecution in 16,216 out of 133,777 examined cases. In the years 1996 – 2000, the CIP recommended that approximately 5.6% of cases examined be prosecuted.[82] From the inception of the CIP in 1949, only 16 cases out of a total of those 15,718 cases, in which victims had requested an indictment, were referred to the

[77] See Article 1 for the types of amnesties. Amnesties might either be based on a cabinet order or, on an individual basis, granted by the National Offenders Rehabilitation Commission.

[78] The total number of complaints against public officials for human rights violations, most of which did not result in criminal prosecutions, were as follows: 384; 1997: 490; 1998: 671; 1999: 1038; 2000: 1184. The figures for the police and prison officials respectively is as follows: 1996: 29/5; 1997: 60/15; 1998: 80/25; 1999: 118/21; 2000: 119; 46. See Ministry of Justice, Annual Reports of Statistics on Civil Affairs, Litigation and Civil Liberties, for the period 1996-2000.

[79] AI, Japan: Ill-Treatment of Foreigners, supra, p.8.

[80] AI, Welcome to Japan?, supra, p.8.

[81] The prisoner was injured through the use of restraining devices. The prosecutors also suspected that abuse by prison officials led to the death of another prisoner who had been held in solitary confinement and placed in restraining devices. See ***Death in Nagoya Prison***, The Japan Times, 9 November 2002 as well as two further articles on the case in the same paper on 10 and 12 November 2002.

[82] This percentage includes all kinds of criminal cases. See "General Situation of Criminal Cases in the Year of 2000 (1)", Criminal Affairs Bureau Supreme Court, Hoso Jiho, Februrary 2002, p.234.

competent court. Out of the 16 criminal cases initiated by this procedure that had been concluded by 2000, only 8 cases resulted in a guilty verdict (the rate is 0.11%).[83] While the statistics are not specific to torture or ill-treatment, it shows that the likelihood of successfully challenging a decision of the public prosecutor is slim.

The extremely low ratio of cases ending up in court under the quasi-prosecution procedure can be explained by the lack of legal aid for victims to access counsel and the difficulties for victims to secure evidence and witnesses for the preliminary hearing. When victims are capable of appointing lawyers, they have encountered difficulties in accessing investigation files or other internal police documents and have had to rely on the co-operation of the public prosecutors. Equally, delays from the time of lodging a complaint until the quasi-prosecution is affirmed have negatively impacted on the availability of reliable evidence.[84]

Independent medical reports are often not available and detainees reportedly have only received cursory medical examination or requests for medical attention by detainees have not been complied with.[85] Physicians may visit detainees in police detention or custody but are often reluctant to do so because the police do often not allow them to carry out appropriate medical examinations. Cases have been reported where medical reports had been manipulated before it was made available by detention facilities.[86]

Whereas public officials receive support in their defence, victims not only have to rely on lawyers' support, often on a *pro bono* basis, but also have to overcome the prejudices that judges are likely to have when the victims have a low social status.[87]

As the independence of judges is guaranteed in the Constitution and mostly respected in practice, it is not so much any outside interference as the mindset of the judges which appears to make many of them prone to place more value on the statements of public officials than on those made by victims. The courts have not taken a proactive role in calling for investigations into torture, in cases where the defendants alleged that their confessions had been extracted by means of torture or other ill-treatment even when such confessions were not admitted into evidence.[88]

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[83] For the figure from 1949 to 1990, see Takashi MIKAMI, ***Kensatukanyaku Bengoshi Kara Mita Hushinpanseido no Mondaiten to Kaizensaku***, Jiyu to Seigi, 43-7, p.20; and for the period 1991-2000, Criminal Affairs Bureau, Supreme Court, "General Situation of Criminal Cases in the Year of 2000 (1)," Hoso Jiho, Lawyers Association Journal, 54-2, pp.131-132).

84 See Tatsuyuki Shinya, Fushinpan jiken no genjou to mondaiten, in Murai and others, Kenshou Fushinpan Jiken, Nihonhyouronsha 1994, 13; "Problems and Measures for Improvement Concerning Judicial Quasi-Indictment System" in Jiyu to Seigi, 43-7, 5.

[85] AI, Ill-Treatment of Foreigners, supra, pp.4-5.

[86] See ibid., pp.11 et seq.

[87] See Shinya, 1994, p.13 who also referred to the article on Problems and Measures for Improvement Concerning Judicial Quasi-Indictment System in Jiyu to Seigi 43-7, p.5.

[88] Confessions made under compulsion, torture or threat, or after prolonged arrest or detention are not admissible as evidence in court, Article 38(2) Constitution and Article 319 (1) CCP. A person shall not be convicted if the only evidence against him/her or is his/her confession, Article 38(3) Constitution and Article 319 (2) CCP. Some scholars proposed to criminalize "act of coercing confession" because of the apparent inadequacy of the current system to prevent coerced confessions, see Y. Hiraba and R. Hirano (eds)., *Keihou Kaisei no Kenkyu* 2, 3rd ed, K. Naito, Toudai Syuppankai, 1975, p.156. However, this proposal was not adopted in the bill amending the Criminal Procedure Code.

3.3. Prosecutions

The available statistics concerning prosecutions under Articles 195 and 196 Penal Code for the period 1997 to 2001 show that out of 1620 cases, only 19 indictments resulted.[89] For cases brought to trial, often on charges of bodily injury only, conviction rates have been low and the execution of most sentences has been suspended. Thus, in the period of 1990 to 2000, there have been a total of 4 guilty verdicts for offences under Article 195 and 7 convictions for offences under Article 196 by first instance courts.[90] The sentences imposed by the district courts ranged from imprisonment of less than six months in one case to imprisonment of more than six months or more than two years in the others. The execution of all of these sentences was suspended.[91] This also applies to cases brought under the quasi-prosecution procedures.

On 24 March 1999, the Kanazawa District Court sentenced a police officer to imprisonment without suspending the sentence under the quasi-prosecution procedure. This is the first case in which the execution of the sentence was not suspended.[92] However, upon appeal, the High Court, ruled that the punishment be sentenced "with suspension."[93]

One of the typical reasons for the suspension of sentences is the attitude of judges to the stigma the defendants already face by the Court process. In one case, the court reasoned that the defendant who is a public officer (ex. police officer) "has already been slapped with social sanctions"[94] and the defendant has been working earnestly.[95] The high number of suspended sentences in these cases also reflects a general practice of Japanese courts.[96]

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[89] Annual Report of Statistics on Prosecution for 1997-2001, Ministry of Justice. In comparison, the figures of prosecution and non-prosecution for other offences are as follows: Bodily Injury (Article 204 Penal Code): 22768/26166; Grievous bodily injury (Article 205 Penal Code): 1348/612; Violence (Article 208 Penal Code): 1964/11405; Intimidation (Article 222 Penal Code): 1126/1134. In 2001, public prosecutors received 325 complaints concerning violence and cruelty by special public officials (Article 195 - 196, CCP) and only 6 cases were brought to trial. In 2000, 8 cases were brought to trial out of 337 complaints, and in 1999, 4 cases out of 357 complaints. See Ministry of Justice, Annual Report of Statistics on Prosecution for 1997- 2000. Note that there are some torture/ill-treatment cases dealt with under ordinary crimes of violence, bodily injury and others.

[90] However, there are some cases that have been decided under Art.204 PC (Bodily Injury), Art.2 PC (Resulting in death, Art. 204 PC), Art.176 PC (Obscenity by compulsion), and other common offences, when the defendant was initially indicted of crimes under both Articles 195/196 and other common offences. For example, in the decision of the Osaka District Court on 3 May 1993, Hanrei Times, No.831-246, the court sentenced two defendants to imprisonment with forced labour (1 year for one and 2 years for the other). In this case, while the acts committed by the defendants were factually to be considered as a crime as provided for under both Articles 195 and 176 PC, the punishment was imposed for Article 176 PC only. Thus, this case would be included under the category of cases punished as a crime under Article 176 PC in the statistics.

[91] Annual Report of Judicial Statistics, Vol.2 Criminal Cases for 1984-2000, by Hoso Kai, Lawyers Association.

[92] Kanazawa District Court, 24 March 1999.

[93] *Asashi-shinbun*, 18 May 2000.

[94] Social sanctions refer in this case to the disciplinary punishment he received from the organization he works for.

[95] Osaka District Court, 27 April 1993; Osaka High Court, 31 August 1994, Hanrei Times, No.842, p. 210, No. 864, p. 274.

[96] For example, in 1995, 61.6% of those sentenced to imprisonment were granted suspension of their sentence. See Hamai and others, Victims of Crime in Criminal Justice in Japan, supra.

There are no specific statistics of the disciplinary sanctions imposed on public officers for acts of torture or ill-treatment. From 1997 to 1999, disciplinary sanctions were imposed in 100 out of 219 cases reported to the National Police Agency of 13 municipal police departments (out of 47 departments) concerning allegations of police misconduct.[97]

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitution

The Constitution provides in Article 17 that "Every person may sue for redress as provided by law from the State or public entity, in case he has suffered damage through illegal act of any public official."

1.2. The State Redress Law

In 1947, the State Redress Law was enacted, spelling out the conditions under which a person may sue for redress as envisaged by Article 17 of the Constitution. While Article 17 of the Constitution provides for a right to redress for every person, the State Redress Law introduces a significant limitation of this right for non-Japanese citizens since the law only applies to this group of persons on the basis of reciprocity.[98] Consequently, a foreign national living in Japan who has been subjected to torture or ill-treatment may only claim reparation for these acts from the responsible public agency if the law of the state of his/her nationality provides for an equivalent right.

The state or the public agency is, according to Article 1(1) of the State Redress Law (*Kokkabaishouhou*) of 1947 liable for any damage caused by the unlawful action of public officials, either wilfully or negligently, in the exercise of their duty. The responsible public official, while not directly liable to the victim him/herself, must reimburse the damages paid by the state if his/her action(s) were wilfully or grossly negligent.[99]

A victim may claim compensation under the State Redress Law but not other forms of reparation. The scope of compensation is the same as in the civil law to which the State Redress Law expressly refers.[100] Legal action has to be brought before the administrative section of the district court or civil court within three years from the time when the injured party or his legal representative became aware of such damage and of the identity of the person who caused it, or, failing such knowledge, within twenty years from the time when the unlawful act was committed.[101] Cases for compensation

[97] Annual report of administration review, ***"Gyousei jyou no Shomondai"*** 2001.

[98] Article 6 of the State Redress Law states that: "(a)s for cases in which an alien is the person suffering, the present Law shall apply, only in cases where there exists reciprocal guaranty."

[99] Article 1 (2) State Redress Law.

[100] Article 4 State Redress Law. See for details, infra.

[101] Article 724 Civil Code.

pursuant to the State Redress Law are governed by the relevant provisions of the Civil Code.

1.3. Civil Law

Article 709 of the Civil Code stipulates that "(a) person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom."[102] It also provides that "a person who has caused the death of another is liable in damages to the parents, the spouse, and the children of the deceased, even in cases where no property right of theirs has been violated."[103]

Under the Civil Code, the individual officer and the state are jointly liable, the latter in the form of vicarious liability.[104] The circumstances that give rise to compensation are vague, and therefore it has been left largely to the courts to develop standards on the causal connection between the act and the damage suffered, the definition of intention and negligence, and the scope of compensation for particular damages. Compensation includes both pecuniary[105] and non-pecuniary damages but not punitive damages.[106] The parties can agree on other forms of reparation, but in the absence of such agreement compensation will be assessed in monetary terms.[107] According to the jurisprudence of the Supreme Court, members of the victim's family may also claim compensation on the basis of Articles 709 and 710 of the Civil Code for the mental damages they suffered as a result of the death of the victim.[108]

An action for tort in civil courts has to be brought before the court at the place where the tort was committed[109] within three years from the time when the injured party or his legal representative became aware of the damage and of the identity of the person who caused it, or, failing such knowledge, within twenty years from the time when the unlawful act was committed.[110] The procedure is governed by the recently adopted Civil Procedure Code, which combines elements of common and civil law traditions.[111] In a trial for state compensation, the parties and their legal representative may also, even before the commencement of the trial, subpoena the prison medical reports and charts,

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[102] Basic Japanese Laws (Clarendon Press, Oxford 1977), edited by Hiroshi Oda, 146.

[103] Article 711 Civil Code.

[104] See Article 709 Civil Code on general liability and Article 715 Civil Code on the liability of employers.

[105] Chushaku Minpou ed., p.597. In case of death of the claimant's family, not only the costs for the funeral, Supreme Court, 3 October 1968, Hanreijihou 540-38, but also the estimated income which the deceased may have earned if he/she were alive is compensated, see Chushaku Minpou, *supra,* p.598.

[106] Article 710: "A person who is liable in damages in accordance with the provisions of the preceding Article must make compensation therefore even in respect of non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights."

[107] See Article 417 Civil Code.

[108] Supreme Court, 1958.8.5, ***Saikousaibansyo Minji Hanreisyu*** 12-12-1901; K.Kawai, ***Minpou Kyoshitsu Fuhou Koui Hou***, Nihonryohonsya, 1995, 2nd ed., p. 224.

[109] See Articles 4, 5 and 9 Code of Civil Procedure.

[110] Article 724 Civil Code.

[111] See A Guide to Court Procedures, Outline of Civil Trials in Japan, available at http://courtdominio.courts.go.jp.

if necessary.[112] While the court may, in a civil case, take note of an existing decision of a criminal court in the same matter, and will usually judge the responsibility of the defendant for damages claimed as established in case of a guilty verdict in criminal court, it is ultimately free to examine and assess the evidence independently of the criminal case.[113]

The victim is required to pay a small court fee for filing the complaint.[114] The costs of litigation, including the initial filing fee, are to be borne by the losing party.[115] An indigent party may apply for legal aid.[116]

After the sentence is declared, the procedure will follow the Code of Civil Procedure and the Code of Civil Enforcement.

1.4. Criminal Law

The law does not allow a victim to join criminal proceedings as *partie civile*. However, the recently enacted Law concerning Measures Accompanying Criminal Proceedings to Protect Crime Victims introduced a new procedure aimed at encouraging the conclusion of compensation agreements for the benefit of the victim.[117] Thus, an accused and a "victim and others"[118] may jointly request the court to include in the protocol of the trial any agreement reached between them in a civil lawsuit related to the criminal case. This inclusion in the protocol shall have the same effect as a judicial compromise and the procedure of settlement is taken in accordance with the Code of Civil Procedure.

2. The Practice

There are no specific statistics on the number of cases brought against the state or its agencies for torture or ill-treatment. In the majority of cases where victims have taken legal action, they have apparently sued for reparation under the State Redress Law. In 2001, the total number of cases under the State Redress Law was 3507 according to Government statistics.[119] Internal statistics of the Centre for Prisoners Rights, a Japanese

[112] See Section 7, Articles 234 et seq. Code of Civil Procedure.

[113] The new Victim Protection Law, supra, 2.3.1., also provides that in criminal cases, the court may permit a "victim and others" and the legal representative and others to inspect or copy the trial record prior to the final adjudication, when the court finds it necessary for the "victim or others" to exercise his/her/their right to claim compensation or when the court finds good reasons (Article 3).

[114] See on court fees Articles 61-81 Code of Civil Procedure.

[115] See ibid., and for the content of the judgment, Articles 243-260 Code of Civil Procedure.

[116] There is a legal aid system for civil and criminal proceedings. This system has been run by the private foundation, "*Houritu Fujyo Kyoukai*" since the Japanese Bar Association established this foundation in 1952.

[117] See Articles 4-7 of the Law.

[118] According to Article 2 of the law this phrase refers to the victim and, in case the victim has died or is mentally unfit, his/her spouse, direct relatives or sisters and brothers.

[119] Hoso Jiho, Lawyers Association Journal, Vol.54. No.7, General Situation Civil and Administrative Litigations of the Government in the Year of 2001, Litigation Planning and Coordination Division, Minister's Secretariat, Ministry of Justice, p. 66.

NGO, show that prisoners have, over the last five years, filed on average of more than 1,000 civil suits per year against the state or public agencies (more than 2000 in 2000).

The number of administrative suits is much lower - less than fifty per year. These statistics do not provide any indication as to how many of the suits related to allegations of torture or ill-treatment. It is generally recognised in Japan that the ratio of successful legal action against the State in administrative suits is extremely low, a fact that has triggered calls for a comprehensive study to be carried out by the government, into the causes for the ineffective functioning of the administrative litigation system.[120]

There appear to be three crucial factors for the low success rate in administrative cases. Firstly, the legal aid system by *Houritu Fujyo Kyoukai* is insufficient in reparation cases.[121] Legal aid is confined to those persons considered indigent and given in the form of a loan, and is often refused in administrative cases because victims find it difficult to prove that there is a likelihood of success, a condition which needs to be satisfied in order to obtain legal aid. Moreover, the amount of legal aid normally provided for in such cases is very small, about 350,000 Yen (about £ 2,000 or less). This sum will make it difficult for a victim to appoint a lawyer. Moreover, given the small amount of compensation generally awarded in administrative cases, the victim is faced with the choice of either not taking legal action at all, because any money awarded would most likely have to be paid as lawyers' fees or has to proceed without the aid of a legal representative.

Secondly, victims find it difficult to collect and provide sufficient evidence, especially in the absence of independent witnesses and the usual claims of law-enforcement personnel that they had to use force in self-defence or that any injuries had been self-inflicted. This applies in particular to prisoners whose rights to attend trials,[122] present evidence and consult with their legal representatives without interference have been restricted by Japanese courts.[123] Moreover, inadequate investigations and the relatively small number of successful prosecutions in cases relating to torture and ill-treatment significantly lower the chances of a favourable outcome since, even though a criminal conviction is not a prerequisite for a successful claim, plaintiffs will face difficulties of satisfying the burden of proof in the absence of sufficient evidence.

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[120] "With regard to how judicial review of administration should be, (...) it is necessary to conduct a comprehensive study from various angles under the basic concept of the "rule of law", with the roles of the judicial and administrative branches in mind. The government should promptly begin such study in earnest." Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century -, 12 June 2001, The Justice System Reform Council, Chapter II, Part 1-9, obtainable from http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/.

[121] Insufficiency of legal aid, Hearing from Mr. Keita Abe, Program Director, Japan Legal Aid Association, ***Kaido, Houmushou tono benkyoukaiyou houkokusho***, No.3 ***Minjisoshou/Gyouseisoshou niyoru kyusai ni okeru mondaiten***.

[122] The Sapporo High Court held that it was legal, as recognised in Article 31 of the Constitution and Article 12 of the Penal Code for prisoners serving sentences with labour components to be prevented from attending oral pleadings, although it affirmed that the Constitution provides for the right of the interested parties of civil and administrative suits to attend oral pleadings, Sapporo High Court, 1997.9.26, Hanrei taimuzu, n.364, p.205. The Tokyo High Court concluded that the refusal of the prison authorities to permit the detainee to attend oral proceedings as claimant and to suspend the punishment in order to prepare his case was lawful, Tokyo High Court, 1976.12.23, Hanrei taimuzu, n.466, p.105.

[123] See Tokushima District Court, 1996.3.15, Takamatsu High Court, 1997.11.25, and decision by the first chamber of the Supreme Court, 2000.9.7.

Thirdly, judges appear to be reluctant to award compensation against the state as courts are seen to show deference to the position taken by the authorities.[124]

Some recent cases illustrate these difficulties. In a case recently decided by the Chiba District Court, which concerned ill-treatment, the claimant, a prisoner on remand, who had been confined in a protective cell and bound with handcuffs of metal and leather, sued for reparation against the state. In the first instance, the district court held that there was no necessity to confine the claimant in the protective cell and bind him with handcuffs of metal and leather and held that the state had to pay compensation.[125] However, the appeal court rejected the judgment of the first trial and held that the measures taken were necessary and thus lawful and the case was concluded.[126]

In one of the two cases brought by foreign nationals for ill-treatment suffered in Japan, a US national, who had allegedly been assaulted in prison and confined in a protective cell with handcuffs, claimed reparation against the state. The Tokyo district court rejected the assertion that Article 6 of the State Redress Law, which provides for the principle of reciprocity, violates the Constitution and the ICCPR, but found the State Redress Law applicable because the United States satisfies the reciprocity principle. The case itself was eventually dismissed.[127]

In another case, the parents of an Iranian man who died of heart failure brought on by serious head injuries at the Tokyo Regional Immigration Bureau detention center in August 1997 filed a suit under the State Redress Law, claiming that their son had died as a result of an assault by security officers. There had been a criminal investigation against the officers concerned in relation to the crime of bodily injury resulting in death. The investigation resulted in a decision of non-indictment. The suit was finally dismissed by the Tokyo District Court in February 2002 on the ground that the victim had inflicted the fatal injury himself.[128]

V. GOVERNMENT REPARATION MEASURES

1. Reparation for human rights violations committed by Japanese forces during the Second World War.

The Japanese government has to date, not fully acknowledged or apologised for the various forms of ill-treatment of those under Japanese occupation. The victims of these serious human rights violations have not received any form of reparation, be it through

[124] Tokyo Bar Association, ***Atarashii Shihouseido no Jitsugen ni Mukete, Gendaijinbunsha***, 2002, p.281, S. Kisa & J. Yukawa, ***Gyoseisosyou no Genjyo no Mondaiten to Kaikaku no Houkokusei***, Journal of Judicial Reform in Japan April 2001, Gendaijinbunsha, p.9.

[125] Chiba district court 2000.2.15.

[126] Tokyo High Court, 2001.2.15.

[127] Tokyo district court, 2002.6.28, not yet published.

[128] Mainichi Daily News, Court rules Iranian's detention death his own fault, 26 February 2002, http://mdn.mainichi.co.jp/news/archive/200202/26/20020226p2a00m0fp003000c.html.

a government fund or through Japanese courts. The latter have dismissed cases brought by Philippine "comfort women", Dutch prisoners of war, Koreans and Chinese villagers against Japan for sexual slavery, forced labour, wrongful arrest and extra-judicial executions, holding that the Hague Conventions did not provide any individual right for compensation directly against a State.[129] The courts also rejected the claim that an individual right to compensation for damages resulting from crimes against humanity existed in customary international law.[130] Moreover, Japanese law did not recognise a right to compensation against the State at the time when the acts were committed[131] and held that the actions were by now time-barred.[132]

This development has to be seen against the backdrop of pressure of women's organisations in South Asia, which, beginning in 1988, revealed the extent of rape and sexual slavery of the so-called comfort women at the hands of the Japanese military, brought the first lawsuit for compensation in Japan in 1991, and raised the issue before the Commission on Human Rights. The Japanese government after the initial dismissal of the claims and continuing denial of its legal responsibility, did, in 1995, establish the Asian Women's Fund. While this Fund, which is mainly financed out of private contributions, provides some assistance, it has not met the full approval of survivors as it ignores the question of legal responsibility. The "comfort women" movement culminated in a People's Tribunal, i.e. the Women's International War Crimes Tribunal 2000, which was set up to consider the criminal responsibility of high ranking Japanese military and political officials as well as the responsibility of the State of Japan for crimes against humanity.[133]

1.2. Assistance for the victims of crime

According to the Law concerning Financial Benefit and Other Assistance Measures for Crime Victims, 2001, a revised form of the Crime Victims Benefit Payment Law, 1980, crime victims are eligible for certain benefits in cases of death, severe injury, disease or disability as a result of criminal acts against somebody's body or life. Consequently, three types of benefits may be awarded. The severe injury and disease benefit is to be awarded to victims who suffered an injury or disease requiring either medical treatment of at least one month or hospitalisation of a minimum of 14 days. The amount awarded covers the individually paid medical expenses for up to 3 months. The disability benefit,

[129] See Henson et al. v. State of Japan, Tokyo District Court, 9 October 1998; X et al. v. The State of Japan, Tokyo District Court, 27 July 1995; X et al. v. State of Japan, Tokyo District Court, 30 November 1998. Excerpts of judgments and reference available online at: www.icrc.org/ihl-nat.nsf. See for the cases filed by three survivors for compensation in relation to a 1932 massacre of Chinese villagers by the Japanese Civil Army, decided by the Tokyo District Court on 28 June 2002, People's Daily, English Online Edition, Japanese Court rejects Chinese massacre survivors' compensation claim, 28 June 2002, which refers to the Kyodo news agency according to which only four out of the sixty suits filed in Japan for compensation in relation to the conduct of the Japanese before or during World War II had been successful before lower courts. While the article does not mention whether any of these cases have become final, this would be rather unlikely in the light of the consistent jurisprudence of higher Japanese courts on this subject matter.

[130] Henson et al. v. State of Japan, supra.

[131] See X et al. v. State of Japan, Tokyo High Court, 7 August 1996.

[132] Henson et al. v. State of Japan, supra.

[133] See Christine Chinkin, Towards the Tokyo Tribunal 2000, http://www.iccwomen.org/tokyo/chinkin.htm And the transcripts of the oral judgement, delivered in The Hague, The Netherlands, 4 December 2001, http://www.iccwomen.org/tokyo/summary.htm.

the amount of which depends on the age and income of the beneficiary, is awarded in cases of disability resulting from the criminal act.[134] The family of the deceased victim is eligible for a Survivor Benefit, which is also based on age and income of the victim.[135] Benefits may not be granted in those cases where the victims have been awarded compensation for damage through other channels. In order to receive such benefits, the victim must report the crime to the police to be recognised as a victim. He/she has to send an application for eligibility to the municipal public safety commission or police department, within two years from the time of finding out about the commission of the crime, or a maximum period of seven years after the commission of the crime. In general, the claimant will be notified of the decision five months after submitting an application and, if awarded, it takes another two weeks for the benefits to be made available.[136]

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution over acts of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

Japanese law allows for the prosecution of perpetrators of torture committed in a third country on the basis of the active personality principle and the principle of universal jurisdiction.

Article 3 of the Penal Code provides that the Code shall apply to a Japanese national who commits certain crimes outside Japan, including rape and bodily injury.[137] Article 4 (1) stipulates that Japanese public officials are subject to Japanese criminal laws for certain specifically listed criminal offences, such as abuse of office and violence against prisoners in custody.[138] The Penal Code also applies pursuant to Article 4(2) "to every person who has committed outside Japanese territory those crimes mentioned in Book II which are considered to be punishable by a treaty even if committed outside Japanese

[134] 180,000 to 18,492 000 Yen.

[135] 3,200 000 to 15,730 000 Yen.

[136] See http://www.ojp.usdoj.gov/ovc/intdir/japan.htm.

[137] The criminal offences that might be applied in cases of torture and ill-treatment are Articles 176-199, 181, 199, 204-205, 220, 221 Penal Code. Note that a number of offences which might be applied in lieu of a specific offence of torture, supra III, 1) are not covered by Article 3.

[138] "This Code applies to public employees of Japan who commit any of the following crimes outside Japan: (iii) Crimes provided in Article 193 [abuse of authority], paragraph 2 of Article 195 [violence against prisoner in custody], and Articles 197 to 197-3 [bribery offences], as well as the crime of killing or injuring a person in the course of committing the crime provided in paragraph 2 of Article 195 [as amended by Law No.61, 1941; Law No.107, 1958]." The reason why Article 195, paragraph 1 is not included in Article 4 is that the performance of official duties by courts, prosecution, police were not expected to be conducted outside Japan, see ***Daiconmentaru Keihou 1 (Seirinshoin***), 1992, Furuta, p.82.

territory."[139] The term "treaty" in Article 4(2) may be applied to any treaty that came or comes into effect in Japan after 1987. It therefore applies to the Convention against Torture, to which Japan acceded in 1999, but not the four Geneva conventions. However, the conduct in question also must constitute a criminal offence under Japanese law. Hence, certain forms of torture and ill-treatment which may not be established offences in Japanese criminal law, might fall outside the ambit of Article 4(2) Penal Code.

Diplomats and heads of states enjoy immunity from criminal proceedings in accordance with the provisions of the Vienna Convention on Diplomatic Immunity, 1961 and applicable rules of customary international law.

1.1.2. Extradition Laws

Extradition of alleged perpetrators of crimes is either carried out on the basis of an extradition treaty with the requesting state[140] or in accordance with the Extradition of Criminal Fugitives Act.[141] The Extradition Act does not specify the crimes that are extraditable but stipulates the conditions under which extradition must be refused, in particular for political crimes and for crimes carrying a punishment of less than three years imprisonment in the requesting state and in Japan.[142] Japanese nationals will not be extradited.[143] These limitations on extradition are not applicable should any existing extradition treaty with the requesting state provide otherwise.

While torture can be considered to be an extraditable offence in accordance with the Convention against Torture, subject to the limitations spelled out in Article 2 of the Extradition Act, extradition might be refused for those crimes relating to ill-treatment which are punishable by not more than three years imprisonment.

The decision as to whether to extradite will be made by three different authorities, firstly the Ministry of Foreign Affairs, then the Ministry of Justice and then the Tokyo High Court. The final order to extradite the fugitive is made by the Minister of Justice,[144] constituting a "highly political and discretionary consideration, which takes account all such aspects as the diplomatic consideration on the requesting state, the necessity to maintain domestic legal order, and the protection of the fugitive's human rights."[145]

1.2. The Practice

[139] This provision was inserted in 1987, in order to ratify the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (***Daiconmentary keihou*** 1, p.85). The "Book II" of the Penal Code contains Articled 77 to 264.

[140] Japan has so far only concluded such bilateral extradition treaties with the United States of America and South Korea.

[141] Law No.68 of 1953.

[142] See Article 2(1), (2), (3) and (4) of Law No. 68.

[143] Article 2 (9) of Law No. 68.

[144] Articles 2-4, 9, 10 and 15 Extradition Act.

[145] Decisions by the Tokyo High Court, 1990.4.20, 1990.4.25.

Despite the existence of Article 4(2) of the Penal Code providing for the exercise of universal jurisdiction, the government is widely seen as showing a passive attitude in actually implementing the provision.[146] While the relevant provisions of the Convention against Torture are arguably directly applicable,[147] the lack of implementing legislation constitutes a major obstacle to such prosecutions in practice. There are no known cases in which Japanese courts or authorities have exercised universal jurisdiction over acts of torture.

Peru seeks the extradition of Alberto Fujimori for crimes involving serious human rights violations, including torture.[148] Alberto Fujimori fled to Japan from Peru in November 2000 and his claim of Japanese nationality was confirmed shortly thereafter by the Japanese Ministry of Justice. In August 2001, the Peruvian congress brought charges against Fujimori for crimes against humanity, thereby lifting Fujimori's immunity. In September 2001, the Peruvian Attorney General formally indicted Fujimori before the Peruvian Supreme Court of Justice, alleging that Fujimori was responsible for homicide, kidnapping and serious injury with respect to an incident at *Barrios Altos* in 1991, an incident at the *La Cantuta* University in 1992, and the "disappearance", torture and homicide of a person whose body was found in 1997. The Peruvian Supreme Court also issued an international arrest warrant for Fujimori's arrest through Interpol. The Japanese government appeared reluctant to grant the extradition of Fujimori, should Peru make such a request.[149] The Japanese authorities have so far not taken any steps to prosecute Alberto Fujimori in Japan for the crimes he has been accused of, a move that would be possible pursuant to Articles 3 and 4(2) of the Penal Code. The Peruvian cabinet approved a formal extradition request in June 2002.

2. Claiming reparation for acts of torture committed in third countries

2.1. Suits against individual defendants

As noted in a judgment by the Supreme Court in 1981, there are no statutory or written rules nor international conventions or international laws which stipulate what relationship is required between the defendant and Japan to establish the international competence of the Japanese courts.[150] This assessment has not changed with the recent

[146] Imai, ***"Goumontou Kinshi Jouyaku" no naiyou to tokuchou"***, p.33.

[147] See supra, I. 1.2..

[148] See Kent Anderson, ***An Asian Pinochet? Not likely: The unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimoro***, in: Stanford Journal of International Law, Summer 2002, 177-206, pp.194,195. See for details and developments in the Fujimoro case, the country study on Peru contained in this report.

[149] See Press Conference of the Ministry of Foreign Affairs of Japan, 14 September 2001, Questions in regard to the situation of former President Alberto Fujimoro of the Republic of Peru; Q: "If you do receive contact from the Peruvian side, asking for the cooperation of the Japanese Government, could you tell us what would be the mood?" Mr. Harada: "It depends on the nature of the cooperation requested. As I stated earlier, if it concerns extradition, we would have to cope with such a request in accordance with our rules and regulations, which do not allow for the extradition of Japanese nationals." Available at www.mofa.go.jp/announce/press/2001/9/914.html.

[150] See for this paragraph Masaki Hamano, Comparative Studies in the Approach to Jurisdiction in Cyberspace, Chapter V: Japan, available at: www.geocities.com/SiliconValley/Bay/6201/japan/art.html, also for references regarding the cited Supreme Court judgements.

adoption of a new Civil Procedure Code, which has not clarified the question of the jurisdiction of Japanese courts in cases with an international connection. In the absence of any clear rules, the courts may follow the above-mentioned Supreme Court ruling in which the court stipulated that the principle of reasonableness, having the purpose of promoting impartiality between the parties and the ends of a fair and speedy hearing, should be applied. This will be the case where Japan is recognised as the forum State as provided for in the Code of Civil Procedure. The Supreme Court held in 1997 that a Japanese court can only refuse to exercise jurisdiction where there are extraordinary circumstances inconsistent with the principle of reasonableness.

Under the Code of Civil Procedure, courts have jurisdiction in the place of residence of the defendant which shall be determined by his present or last address.[151] Moreover, a victim may, according to Article 5(9) of the Code of Civil Procedure, bring a suit in tort before the court in the "place where the tort occurred." This is the place of the tortuous action itself or the place where the damage actually materialised. Jurisdiction may also be based on Article 5(4) of the Code of Civil Procedure if the defendant has any assets in Japan.

Thus, in a case relating to torture or ill-treatment abroad, the courts may have jurisdiction in those cases where the alleged perpetrator has or has had a domicile in Japan or where the damage inflicted by the torture materialised in Japan. In the absence of any of these grounds and any assets of the alleged perpetrator being located in Japan, a Court might still declare itself to be competent by applying the tests of reasonableness and extraordinary circumstances. In the light of the relevant jurisprudence of Japanese courts, the exercise of international jurisdiction will probably only be refused if either the victim or the defendant or the case itself has no or hardly any links with Japan.

Diplomats and heads of states enjoy immunity from civil suits in accordance with the provisions of the Vienna Convention on Diplomatic Immunity, 1961 and applicable rules of customary international law.

Should a Japanese court determine that it has jurisdiction to entertain the case, the applicable law is in principle the law of the country where the tort was committed but the laws of the forum state, i.e. Japan, can be applied under certain circumstances.[152] The jurisprudence of Japanese courts has not been consistent in respect of the applicable law.[153]

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[151] Article 4 (1) and (2) Code of Civil Procedure.

[152] Article 11 (*Hourei*) Application of Law Code: "1) The formation and effect of claims arising from management of affairs without mandate, unjust enrichment or tortious acts are governed by the law of the place where the events forming the cause of such obligations have occurred. 2) The provisions of the preceding paragraph do not apply to tortious acts if the events occurring in a foreign country are not unlawful according to Japanese law. 3) Even when events occurring in a foreign country are unlawful according to Japanese law, the injured person can assert no claim for compensation for damage or for other measures except such as are recognized by Japanese law, Hiroshi Oda, Basic Japanese Laws, Oxford, 1997.

[153] The court decisions concerning civil torts committed in other countries are not consistent in regard of the following issues: deciding the place where torts occurred, and deciding the scope in which Japanese laws should be applied with regard to a scope of accountability of perpetrator, causality, statute of limitations, the way of reparation and other various points. See, for example, Yutaka Orimo, Kokusaishihou Kakuron, Shinban, Houritsugakuzenshu, Yuhikaku, 1990, 177; Article by Matsuo Maruoka in Jurist Zoukan, Kokusaishihou no souten, edited by Takao Sawaki, 104-105.

There are no known cases in which victims of torture or ill-treatment committed in a third country have taken legal action against their perpetrators in Japanese courts with a view to obtaining reparation.

2.2. Suits against States

There are no treaties or statutory provisions allowing for legal action for personal injury against a foreign State in Japan. While Japan has traditionally followed the rule of absolute state immunity for acts of a sovereign nature, the Japanese Supreme Court has recently ruled that it would not be appropriate to grant immunity from civil suit for acts of a commercial nature.[154]

There are no known cases in which victims of torture have sued a foreign State before Japanese courts.

[154] See the *Yokata Base* case, decided by the Second Chamber of the Supreme Court on 12 April 2000, referred to, together with another case decided by the Tokyo District Court in 2000 denying immunity for commercial activities, in Fox, Hazel, The Law of State Immunity, Oxford, 2002, p.127, Fn.10.