HANGING BY A THREAD

MENTAL HEALTH AND THE DEATH PENALTY IN JAPAN

CONTENTS

Note on names

Japanese names take the form *Family name* followed by *Given name (e.g. Hakamada Iwao)*. This report uses this form.

Non-Japanese names or names quoted in a non-Japanese context (such as in English language publications) follow the form *Given name* followed by *Family name (e.g. John Smith)*.

Abbreviations

ABA	American Bar Association
AMA	American Medical Association
APA	American Psychiatric Association
CPR	Center for Prisoners' Rights
FIDH	Federation Internationale des Ligues des Droits de l'Homme
HRC	(United Nations) Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
JFBA	Japan Federation of Bar Associations
JMA	Japan Medical Association
JNA	Japan Nursing Association
NGO	Non-governmental organization
JSPN	Japanese Society of Psychiatry and Neurology
WMA	World Medical Association
WPA	World Psychiatric Association

1/INTRODUCTION

> *"Because writing. There is no case, but innocent comes out. I had training for 10 years underground. Specially. The magic wisdom started working, the machine made itself. It's called the machine of Gakushuin ... Written, nothing more than written. It's not amongst existing. It's a finished matter. This is not real."* Death row prisoner in response to question about the assistance he was receiving from lawyers.

> *If a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice*. Article 479(1), Code of Criminal Procedure (Act 131)

In 2003 Mukai Shinji, who was reportedly suffering from mental health problems, was executed while his lawyer was preparing an appeal for a retrial.[1]

On 23 August 2007 Japan executed three prisoners, including Takezawa Hifumi, born in 1937, who had reportedly been suffering from mental illness following a stroke, which made him paranoid and aggressive. According to reports of his trial, doctors acting for both the prosecution and the defence diagnosed Takezawa as mentally ill. However, he was deemed fully responsible by the court and sentenced to death.[2]

Other prisoners are reported to have been mentally ill prior to their execution. On 7 December 2007, Fujima Seiha and two other men were executed. He had earlier been found legally incompetent by the Supreme Court but had his sentence confirmed by the Court in June 2004.[3]

Miyazaki Tsutomu was convicted in 1997 of mutilating and killing four girls aged four to seven between 1988 and 1989. He was arrested in July 1989 after being caught molesting a girl. He reportedly showed no remorse for his crimes. He was given a range of psychiatric evaluations, and was diagnosed as suffering from dissociative identity disorder[4] or schizophrenia. However, the Tokyo District Court judged that he was still aware of the gravity and consequences of his crimes and he was therefore accountable for them, sentencing him to death by hanging on 14 April 1997. His death sentence was upheld by the Tokyo High Court on 28 June 2001 and by the Supreme Court of Japan on 17 January 2006. After receiving psychiatric treatment for more than a decade, he was one of three inmates executed on 17 June 2008.[5]

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1 Amnesty International, *"Will this day be my last?" The death penalty in Japan,* Index:ASA 22/006/2006, London, 2006.

2 Amnesty International. "Submission to UN Human Rights Committee." Available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AIJapan92.pdf .

3 His case was also notable for being the first (along with the two others executed the same day) in which the names of the executed were made public on the day of the execution. Prior to this, executed prisoners were not named publicly by the Ministry of Justice.

4 This term come from the Diagnostic and Statistical Manual (DSM-IVTR) of the American Psychiatric Association (diagnostic code 300.14) The International Classification of Diseases (ICD-10) of the World Health Organization names the same entity 'multiple identity disorder' (diagnostic code F44.8).

5 According to the Center for Prisoners' Rights, Miyazaki had been receiving medication typical of that

The effect of mental illness on the behaviour of an offender has long been recognized as a factor in determining culpability and appropriate punishment for crime.[6] The application of the death penalty against prisoners who were "insane" at the time of their offence or who subsequently became insane has been prohibited for centuries in some jurisdictions.[7] International human rights standards prohibit the imposition of the death penalty on, and the execution of, the mentally ill.[8] This report examines the issue of mental health and the death penalty in Japan and is prompted by continuing reports of mentally ill prisoners in Japan being executed or detained in harsh conditions awaiting execution.

The challenges to researching the death penalty in Japan are considerable. The criminal justice system in Japan is secretive.[9] Parliamentarians, legal reformers, national and international non-governmental organizations (NGOs) and foreign politicians have all been refused access to death row or to see individual prisoners. Moreover, reliable information about individual prisoners' health is not readily available to their own lawyers – and certainly not directly from prison medical staff – and even family members of prisoners are uncertain about important aspects of their relative's health.[10]

THE DEATH PENALTY IN JAPAN -- A SPECIAL CASE

The use of the death penalty in Japan is an anomaly. The crime rate is low in comparison to other countries of a similar socio-economic level of development and the number of murders

given to treat schizophrenia. See CPR. The Alternative Report on the Fifth Periodic Reports of the Japanese Government under Article 40 of the International Covenant on Civil and Political Rights, September 2008, p.8.

6 In Japan, the legal code, *Youro Ritsuryo*, introduced in the eighth century, reduced the punishment applicable to people affected by insanity (G. Hiruta, "Criminal responsibility and confinement of the insane from antiquity to early modern Japan", *Seishin Shinkeigaku Zasshi*, 2003;105(2):187-93). The writings of the 13th century English jurist Bracton noted "...a crime is not committed unless the intention to injure exists, as may be said of a child or a madman, since the absence of intention protects the one and the unkindness of fate excuses the other." Bracton Online: *Bracton: De Legibus Et Consuetudinibus Angliæ* (Bracton on the Laws and Customs of England, attributed to Henry of Bratton, c. 1210-1268) Vol 2, p.384. Available at Harvard Law School Library: http://hlsl5.law.harvard.edu/bracton/Common/calendar.htm.

7 US Supreme Court. Brief of Legal Historians, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407) reviewing common law proscriptions of the execution of the "insane" since the 18th century. Available at: http://www.deathpenaltyinfo.org/Legal%20Historians%20Brief.pdf. "Insanity" as evaluated in court hearings is a legal concept and remains embedded in some laws (including those of Japan). Increasingly concepts of mental health and mental illness are entering into discussions of criminal responsibility and culpability and international human rights law speaks increasingly in terms of mental health and mental disorder as important considerations.

8 See W Schabas, "The abolition of the death penalty in international law", Cambridge University Press, 2002. On standards, see for example, 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 prohibition also extends to those with intellectual disabilities.

9 The level of secrecy in Japan is extreme, particularly for a democracy. One writer quotes an extraordinary exchange between a prison director and a Diet member (parliamentarian) who sought information about an execution that had taken place in the prison the previous day. Despite the execution having already been reported in the press, the Warden refused even to acknowledge that an execution had taken place. See, D Johnson, "Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings", *Asian-Pacific Law & Policy Journal*, 2006, 7(2): 62-124.

10 The sister of a prisoner reported to be mentally ill told Amnesty International that she had been told both that her brother suffered diabetes and that he did not suffer diabetes. (Interview, February 2009.) There appears to be no rationale for withholding such information from family members and doing so breaches international standards.

is also low.[11] The level of imprisonment is also relatively low.[12] The number of prisoners convicted and sentenced to death is a small fraction of all those convicted of capital offences -- a little over 1%.[13] Nevertheless the imprisonment rate has risen over the past two decades, from 36 to 63 per 100,000 population and reflects and explains, in part, a perception that crime is rising.[14] The press contribution to a discussion of capital punishment is predominantly limited to recounting the terrible impact of serious crimes such as murder[15]; there is little public discussion on mental illness and crime; and there has been a surge in executions since 2006.[16] (This surge reflects the increased willingness of recent Ministers of Justice who, under relevant legislation, must approve the execution of the condemned prisoner. Where a Minister of Justice opposes executions, none will take place.)

In a recent survey, Japan was one of only two Asian countries in which use of the death penalty was increasing and the only Asian country reported to show increasingly severe policies with respect to both the death penalty *and* imprisonment.[17] Conditions in Japanese prisons are harsh and have been the subject for many years of criticism not only

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11 See Ministry of Justice. *White paper on crime* (2006). Appendix 1-8. Number of reported cases and crime rate of homicide and theft in 5 countries (1988-2004) comparing Japan's homicide rate to four other developed countries (with Japan's rate being the lowest of the five). Available at: http://hakusyo1.moj.go.jp/. In 2006 the number of prisoners convicted of murder entering the Japanese prison system was 615 (see Ministry of Justice, Corrections Bureau web-site: http://www.moj.go.jp/ENGLISH/CB/cb-01.html. The long-term homicide trend in Japan is downward with the number of murders having fallen by about 70% since the 1950s (DT Johnson, "The homicide drop in postwar Japan", *Homicide Studies*, 12(1): 146-160, 2008).

12 At 63 per 100,000 population, Japan's detention rate is lower than that prevailing in France, Germany, Spain, and the UK, for example. It has prison detention rates comparable to those of Denmark and Finland (which are at the lower end of the imprisonment rate in Europe). It imprisons people at barely 8% of the rate applying in the USA. See, Kings College London: International Centre of Prison Studies. World Prison Brief: http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/, accessed 9 March 2009.

13 D Johnson, "Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings", *Asian-Pacific Law & Policy Journal*, 2006, 7(2): 106-124.

14 D. Johnson, "Japanese punishment in comparative perspective", *Japanese Journal of Sociological Criminology*, 33: 46-66, 2008 [D Johnson, "Japanese Punishment"]. The reasons for changes in crime and imprisonment rates are complex and require consideration of crime reporting practices, prosecutorial practices and levels of public apprehension of crime. (See, K. Hamai, T. Ellis, "*Genbatsuka*, Growing penal populism and the changing role of public prosecutors in Japan?" *Japanese Journal of Sociological Criminology*, 2008, 33: 67-91). See also, *USA Today*, "Japanese homicides fall but hangings rise", 23 December 2008.

15 Though four series of articles on the theme "Unmasking Capital Punishment" appeared in the*Yomiuri Shimbun* in 2008 and 2009. See D. McNeill and the *Yomiuri Shimbun*, "Unmasking Capital Punishment: A Wave of Executions, The Yomiuri and Japan's Death Penalty," *The Asia-Pacific Journal: Japan Focus*, 47(3), 18 November 2008. Available at http://www.japanfocus.org/-David_McNeill__Yomiuri/2953; and *Yomiuri Shimbun*. Unmasking Capital Punishment, 12 June 2009.

16 In Japan the method of execution is hanging. Over the period 2006-2008, the number of hangings was 4, 9, and 15 (the last figure being the highest annual number for 33 years). The progressive increase in death row prisoners is illustrated in Figure 1, page x, below.

17 D Johnson, "Japanese punishment", p.56.

domestically[18] but also by international NGOs[19] and UN bodies.[20] The situation in which death row prisoners find themselves is the harshest of all,[21] with those suffering mental illness liable to suffer additional punishments because their behaviour is likely to infringe the draconian rules imposed on prisoners.

THE DEATH PENALTY, MENTAL HEALTH AND HUMAN RIGHTS

At least since the adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the use of the death penalty has been seen in international human rights law as requiring restriction and control, with abolition seen as something to be encouraged in the short term and realized as soon as practicable.[22] Subsequently there have been a number of international and regional standards applying to the death penalty. These included two statements from the UN Economic and Social Council restricting, inter alia, the use of the death penalty against people with mental disorders[23] and resolutions of the former UN Commission on Human Rights calling for non-imposition and use of executions against

18 Centre for Prisoner's Rights. *The Alternative Report on the Fifth Periodic Reports of the Japanese Government under Article 40 of the International Covenant on Civil and Political Rights*, September 2008. http://www2.ohchr.org/english/bodies/hrc/docs/ngos/Center_Prisoners_Rights_Japan94report.pdf; Japan Federation of Bar Associations. Report on the Japanese Government's Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Tokyo, 2007; available at: http://www.nichibenren.or.jp.

19 Amnesty International, "Japan: Amnesty International Submission to the UN Human Rights Committee", September 2008; Human Rights Watch, *Prison Conditions in Japan*, New York, 1995; Federation Internationale des Ligues des Droits de l'Homme. *The Death Penalty In Japan, A Practice Unworthy of a Democracy*, Paris, May 2003.

20 Many of the criticisms made by the (UN) Human Rights Committee in 1998 (*Concluding observations: Japan.* 19 November 1998. Document CCPR/C/79/Add.102) are found in the most recent Committee report (*Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Japan*, UN Document CCPR/C/JPN/CO/5, October 2008..

21 The Human Rights Committee noted in its 2008 Concluding observations that it was concerned "that death row inmates are confined to single rooms day and night, purportedly to ensure their mental and emotional stability" (para 21).

22 In 1971 the UN General Assembly affirmed the importance of "progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries" (UN GA resolution 2857 (XXVI) of 20 December 1971). A decade later, the Human Rights Committee that monitors and interprets the ICCPR commented that under article 6 of the Covenant, governments "are obliged to limit …use [of the death penalty] and, in particular, to abolish it for other than the most serious crimes. Accordingly, they ought to consider reviewing their criminal laws in this light. The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable." General Comment No. 6: The right to life (art. 6); 30 April 1982. Available at: http://www.unhchr.ch/tbs/doc.nsf. In 2007 the UN General Assembly (UNGA) adopted a resolution calling for a moratorium on the use of the death penalty. The resolution calls on states that have not yet abolished the death penalty to, inter alia, "establish a moratorium on executions *with a view to abolishing the death penalty*" (Italics added; see UNGA resolution 62/149.) The UNGA confirmed this resolution in 2008 with growing support by states.

23 UN Economic and Social Council (ECOSOC), "Safeguards guaranteeing protection of the rights of those facing the death penalty", Resolution 1984/50, 25 May 1984; ECOSOC, "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty". Resolution 1989/64, 24 May 1989. For these, and other international and regional standards on the death penalty, see: Amnesty International. "International standards on the death penalty." Index ACT 50/001/2006, January 2006.

people with mental disorders.[24] The UN Special Rapporteur on extrajudicial, summary and arbitrary executions has affirmed the ban in international law on executing " mentally retarded or insane persons".[25] In addition, a wide range of human rights organizations oppose the death penalty for different principled and practical reasons.[26]

Amnesty International argues that the death penalty violates the right to life and the right not to be subjected to cruel, inhuman or degrading punishment. Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the individual on whom it is imposed, and the method of execution used by the state. In practice the death penalty is applied arbitrarily -- predominantly against marginalized populations. It is irreversible, it inflicts gross suffering on the condemned and on his or her loved ones, and no studies have demonstrated a unique deterrent effect of the death penalty.[27]

It is widely recognized in criminal law and international human rights law that certain factors must be taken into consideration when an individual is tried, convicted and sentenced for a criminal act. While some factors might be aggravating -- the level of violence used in the commission of a crime, for example -- other facts are regarded as mitigating or even exculpatory, such as acting in self-defence or acting under the influence of a serious mental illness.[28] Different national jurisdictions account for mitigating factors arising from mental status in different ways. Cases involving offenders with mental illness can give rise to verdicts of "not guilty due to insanity", "guilty but insane", and "guilty of manslaughter [rather than murder] due to diminished responsibility", among others. In cases where guilt is established by the court, the sentence may be lessened due to the mental state of the accused (though this is not always the case).

International human rights standards prohibit the imposition of the death penalty on certain categories of people (such as juvenile offenders, people with mental disabilities, the elderly, pregnant women and new mothers).[29] In countries where the death penalty is retained in law and used, international law requires that the authorities prohibit and prevent the imposition of the death penalty and the execution of mentally ill prisoners.[30]

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24 Commission on Human Rights. Resolution 2005/59, adopted 20 April 2005.

25 See UN reports E/CN.4/1994/7, 7 December 1993, para 686; and E/CN.4/1998/68, 23 December 1997, para 117.

26 These are discussed in Amnesty International, "*When the State Kills... The Death Penalty v. Human Rights*", Amnesty International Publications, 1989.

27 Amnesty International, "*When the State Kills... The Death Penalty v. Human Rights*", Amnesty International Publications, 1989.

28 The landmark ruling in the British House of Lords in the case of M'Naghten -- the so-called M'Naghten Rules of 1843 -- stated that to acquit an accused for reasons of mental illness (to use a modern term), "It must be clearly proved that, at the time of committing the act, the part accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that was he was doing was wrong". See Daniel M'Naughten's Case, 8 ER 718 (UKHL 1843). This has been an influential judgement in death penalty jurisprudence.

29 See, W. Schabas, *The Abolition of the Death Penalty in International Law*, Second Edition, Cambridge University Press, 1997; N. Rodley, "The United Nations' work in the field of the death penalty", In: Council of Europe. *Death Penalty: Beyond Abolition*, Council of Europe, 2004, pp125-57. Standards addressing the upper age limit on executions include ECOSOC, "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty". Resolution 1989/64, 24 May 1989. The American Convention on Human Rights of the Organization of American States prohibits the execution of persons over the age of 70.

30 UN Economic and Social Council (ECOSOC), "Safeguards guaranteeing protection of the rights of those facing the death penalty", Resolution 1984/50, 25 May 1984; ECOSOC, "Implementation of

The widely shared proscription against executing the mentally ill reflects a general sense of unease at imposing the ultimate punishment on someone with limited understanding of, or diminished responsibility for, their actions. Moreover, such executions would fail key goals of punishment -- retribution, reform, deterrence -- with incapacitation being achieved only in the sense of extinguishing the life of the mentally ill person.[31] For example, in the words of US Supreme Court justice Lewis Powell, the retributive function of the death penalty precludes execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it."[32] This formed the basis for the ruling against executing the "insane" by the US Supreme Court in the case of *Ford v Wainwright* in 1986.[33]

Japan is not the only country failing to effectively prevent the imposition of death sentence and the execution of the mentally ill. One observer of the US criminal justice system wrote of "the utter failure of the [US] criminal justice system to take adequate account of the effects of severe mental illness in capital cases, specifically by failing to assure a fair defence for defendants with mental disabilities, by failing to give morally appropriate mitigating effect to claims of diminished responsibility at the time of the crime, and by failing to correct these deficiencies in post-conviction proceedings."[34] In a wider international setting, there is some evidence that mechanisms to evaluate and take into account the mental state of the prisoner in trial and appeal proceedings are inadequate.[35]

Often the death penalty is imposed after unfair trials, and the conditions of detention experienced by prisoners under sentence of death frequently do not comply with international standards. Indeed on both counts, UN treaty monitoring bodies have expressed concerns at Japan's application of the death penalty. With regard to the conditions of detention there is an extensive array of human rights standards that, when applied to death row prisoners in Japan, would find Japan in breach. These include the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners[36] and the Body of Principles for the Protection of Persons under Any Form of Imprisonment or Detention. With regards to fair trial, there are serious concerns related to the over reliance on confessions obtained in police detention (*Daiyo Kangoku*), the lack of access to lawyers in private, and requests for retrial do not have the effect of staying the execution. The Human Rights Committee has raised specific issues with the government of Japan for more than a decade.[37]

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the safeguards guaranteeing protection of the rights of those facing the death penalty". Resolution 1989/64, 24 May 1989. In particularly high profile cases, public and political revulsion at the crime may be a factor in the rejection by courts of strong evidence of mental illness in the offender and the application of a death sentence.

31 For a critical review of these goals as they related to the death penalty see, HA Bedau. *Killing as Punishment: Reflections on the Death Penalty in America*, Boston: Northeastern University Press, 2004.

32 *Ford v. Wainwright* 477 U.S. 399, 422 (1986) (Powell, J., concurring).

33 *See Ford v. Wainwright,* 477 U.S. 399 (1986).

34 R. J. Bonnie, "*Panetti v. Quarterman*: Mental Illness, the Death Penalty, and Human Dignity." 5 *Ohio State Journal of Crim. Law*, 2007, pp.257-283.

35 R Ferris, J Welsh, "Doctors and the death penalty: ethics and a cruel punishment", *Capital punishment: Strategies for Abolition*, Cambridge University Press, 2004.

36 The Standard Minimum Rules require, for example, that order in a prison shall be maintained with "no more restriction than is necessary for safe custody and well-ordered community life" (Rule 27). In Japan, it is routine to place strict limits on death row inmates receiving visitors or any other human contact -- and even access to sunlight and fresh air.

37 See notes 20 and 21 above.

MENTAL HEALTH AND THE DEATH PENALTY

A number of concepts concerning mental health require consideration in the functioning of the criminal justice system, including the death penalty. These include:

Mental illness: the presence of disorders of thought, mood or behaviour that may impede the affected person's capacity to behave rationally and in conformity with the law.

Intellectual disability (also known as mental retardation): a condition in which a person's mental capacity has not developed during childhood and adolescence leaving the person less able than average to adapt to independent life and decision-making.

Diminished responsibility: this is a legal rather than medical term and refers to the view that a person affected by a mental disorder may not be held to the same level of accountability as someone who is in possession of their faculties.

Personality disorder (in particular, antisocial or borderline personality disorder): this is not a mental illness that can be treated with drugs or therapy but rather constitutes a behavioural condition in which the affected person can lack empathy and understanding of others and can disregard social and legal conventions.[38]

"WHEN IS SOMEONE SANE ENOUGH TO DIE?"[39]

Mental disorders can give rise to crimes, can be a contributing factor or may not be directly relevant to the commission of a particular crime. It is the responsibility of the criminal justice system to take account of the mental state of the accused or convicted offender in order to meet both good penological practice but also international human rights standards.

Moreover, these factors have to be taken account of at different stages of the judicial process. Mental disorders -- including intellectual disability, delusions, hallucinations,, depression -- as well as temporary mental changes, such as those induced by forms of medication, alcohol or substances affecting mental state, may be relevant to the commission of a crime and the competence of the accused to stand trial; the capacity of the person to withdraw legal appeals; and the fitness of the prisoner to be executed. They may also be relevant in understanding the vulnerability of the accused to police interrogation and pressure to confess.

In assessing these factors, courts frequently draw on the opinions of mental health professionals. However, the lines between mental health and mental illness, and between competence and lack of competence, are not fixed and different health professionals may come to different judgements. The fact that one possible outcome of these determinations could be the death of the prisoner adds considerable pressure to the assessment process.

In addition to assessments of mental state, mental health specialists may be called on to treat prisoners found incompetent, with the ultimate goal of such treatment possibly being the execution of the newly competent prisoner. Again this places the ethics of the health

38 See World Health Organization. *ICD-10: International Classification of Mental and Behavioural Disorders*. Geneva. Mental illness, intellectual disability and personality disorders can be known collectively as mental disorders or mental disabilities.

39 M Mello. "Executing the mentally ill: when is someone sane enough to die?" *Criminal Justice* 22(3), Fall 2007.

professionals concerned under pressure. The questions of assessing fitness for execution and restoration of competence by medical treatment are two ethical dilemmas that are faced by doctors as a consequence of the death penalty. Amnesty International believes that resolving these dilemmas can best be achieved by abolishing the death penalty and commuting all death sentences to terms of imprisonment.

THE AIM OF THIS REPORT

This report examines the extent to which mental health is taken into account in the practice of the death penalty in Japan. It is based on research carried out in Japan in the first four months of 2009. It reviews the practice of the death penalty in Japan in the light of human rights standards, and national and international legal standards on the rights of people with mental illness.

Amnesty International delegates met a range of lawyers, doctors, family members, academics, NGOs and others during two visits to the country in 2009. Delegates reviewed available documentation including reports by Japanese and international NGOs, lawyers, doctors, and academics. Meetings with government members and with professional bodies were arranged where possible. A request for a meeting with a death row prisoner was refused by the prison administration.

The report describes Amnesty International's findings and makes a number of recommendations to the Japanese government and to Japanese health professional bodies. These are summarized in the next section and set out in more detail on pages 60-63.

KEY RECOMMENDATIONS

This report draws a number of conclusions and makes several recommendations for the government of Japan and to Japanese health professional bodies. The principal recommendations to government and to health professional organizations, set out in full below (pp. 60-63), are:

© AI. Tokyo Detention House, one of seven locations in Japan where prisoners are executed. Prisoners under sentence of death remain in solitary confinement for many years and even decades in a facility that is essentially designed for pre-trial detention.

TO GOVERNMENT:

Amnesty International's position on the death penalty is simple and widely known: it violates the right to life and it is the ultimate cruel, inhuman and degrading punishment. As such, Amnesty International campaigns for the abolition of the death penalty in all circumstances. Amnesty International calls on all states that retain the death penalty to establish a moratorium on executions during which it can set in place the consultative and practical measures required to abolish the death penalty in law. Irrespective of these measures Amnesty International calls on governments to immediately reform laws and practices that conflict with international human rights standards as well as to give consideration to introducing reforms that will lead to better prison practice. In this spirit Amnesty International calls on the Government of Japan to address the issue of mental health and the death penalty by, inter alia, reviewing existing cases where mental illness may be a relevant factor, make all aspects of the death penalty more transparent, transfer responsibility for prisoner health to the Ministry of Health and Labour, end the lack of notice of execution to prisoners and their families, and improve conditions for prisoners under sentence of death. Recommendations are given in detail in pages 63-65 below.

TO JAPANESE HEALTH PROFESSIONAL BODIES:

Amnesty International calls on Japanese medical, psychiatric and nursing associations to ensure they have clearly stated positions against professional participation in capital punishment; promote good prison health care on an ethical basis and ensure that prison health care is subject to external transparent review and accountability.

2/THE DEATH PENALTY IN JAPAN

BASIS IN LAW

The death penalty has a long history in Japan which is beyond the scope of this report.[40] It suffices to note here that following World War II, a new Constitution was adopted by the Japanese authorities in 1946, undoubtedly influenced by the US occupation forces.[41] The Constitution makes no reference to the death penalty though this punishment was included within the spectrum of criminal justice penalties. In 1948 the Supreme Court of Japan ruled that the death penalty was a constitutional punishment and that, in particular, it did not breach the Constitutional prohibition against the infliction of torture and cruel punishments.[42]

The death penalty has been a part of the Japanese penal system for centuries. The penalty is regulated or referred to in a number of laws (some of which are cited in the appendix). The laws set out the framework in which the death penalty is applied. There are 18 crimes for which the death penalty is applicable although in practice the main crimes attracting the death penalty are murder or robbery with a resulting death.[43]

The Penal Code (Law 45) specifies that execution shall be carried out by hanging (Article 11(1)) and that acts due to insanity or diminished responsibility will not be punished or will attract a lesser penalty (Article 39). The Code of Criminal Procedure (CCP) provides at Article 314 that "In case the accused is in the condition of mental derangement, the public trial procedure shall be suspended by ruling for the period [of the] condition after hearing the opinion of a public procurator and the counsel". Moreover, the CCP specifies (at Article 479) that "if a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice" (see appendices for text). The law therefore requires a lesser punishment where an accused or convicted person has diminished capacity or competence at the time of the crime, during the legal process or at the time of execution.

The Japanese Supreme Court's interpretation of the legal basis for imposing a death sentence was given in a 1983 ruling:

> "The death penalty can be applied only when the criminal's responsibility is extremely grave and the maximum penalty is unavoidable from the viewpoint of

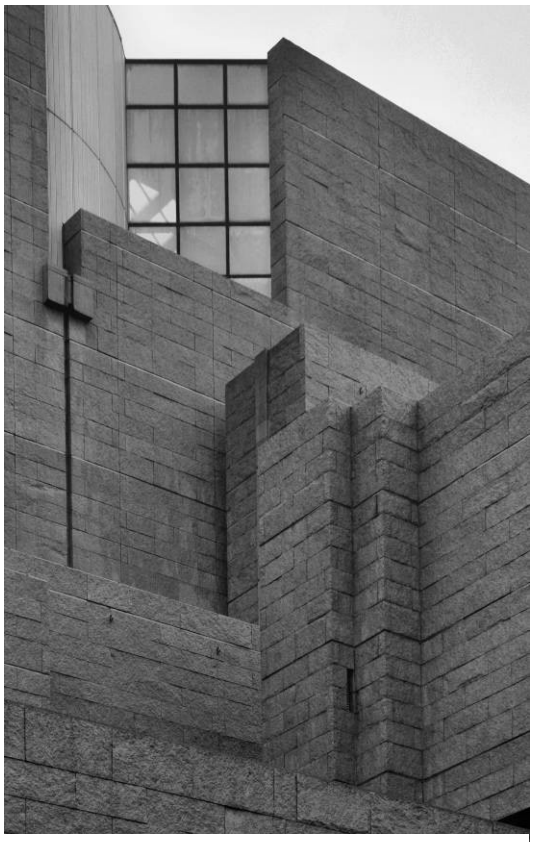
40 Petra Schmidt (2002). Capital punishment in Japan. Leiden, Brill.

41 Adopted 3 November 1946, available at: http://www.constitution.org/cons/japan.txt

42 Article 36. The Supreme Court ruled in the case of Murakami (Grand Bench, Keishu 2, 91) that Article 36 of the constitution had not been breached. Cited in: Byung-Sun Cho (2004). The death penalty in South Korea and Japan: 'Asian values' and the debate about capital punishment. In: P Hodgkinson and W Schabas (eds). *Capital punishment: Strategies for Abolition*. Cambridge University Press, pp: 253-272. In two further cases (Hirasawa case, 1955) and the Ichikawa case, 1961), the Supreme Court ruled that execution by hanging did not constitute cruel punishment (ibid. p.263)

43 The 18 crimes (set out in seven different laws) are detailed in Japan's report to the UN Human Rights Committee – UN Document CCPR/C/JPN/5, 25 April 2007 para 129. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm . At time of writing a 19th crime -- death caused by piracy -- is under discussion in the Diet.

balance between the crime and the punishment as well as that of general prevention, taking into account ... the nature, motive and mode of the crime, especially the persistence and cruelty of the means of killing, the seriousness of the consequences, especially the number of victims killed, the feelings of the bereaved, social effects, the age and previous convictions of the offender, and the circumstances after commitment of the crime." [44]



© AI. The Supreme Court of Japan, Tokyo. Death sentences are initially imposed by the court of first instance, the District Court, where the case is first heard. On appeal, the case transfers to the High Court and final appeals are heard in the

There is an emphasis in Japanese law on the mental well-being of the prisoner -- the law contains explicit references to the obligation of the authorities to maintain the prisoner's "peace of mind".[45] Corrections personnel also give voice to these principles. A representative of the Adult Correction Section of the Justice Ministry was quoted in a 2004 press article as saying: "We want to maintain the mental stability of those waiting for death." He added that "Emotionally, everybody wants them to face their last moments in peace."[46]

The view of one criminologist seemed to Amnesty International delegates to more accurately sum up the interaction of law and practice: "The law says peace of mind [of the prisoner] should be protected; the policy is to break minds".[47]

The procedures leading to conviction and sentence of death are characterized by a number of unacceptable features that contradict this emphasis on prisoner well-being and amount to violations of human rights: (i) detention without legal representation for up to 23 days in *daiyo kangoku* (substitute prison) in a police cell after arrest, which has been repeatedly criticized by the UN treaty monitoring bodies;[48]

44 The judgement delivered on 8 July 1983 by the Second Petty Bench of the Supreme Court. Cited in: Human Rights Committee. Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant Fifth periodic reports of States parties due in 2002; Japan, 20 December 2006, para 128. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm.

45 Act on Penal Detention Facilities and Treatment of Inmates and Prisoners (Act 50), articles 32; 120; 139.

46 B. Wallace, Awaiting death's footsteps, *Los Angeles Times* 2 March 2006. Available at: http://articles.latimes.com/2006/mar/02/world/fg-deathrow2

47 Professor Kikuta Koichi, interview February 2009.

48 Human Rights Committee. Concluding Observations, Japan, 2008, para. 18; Committee against Torture, 2007, para 15. Japan Federation of Bar Associations (2008). Japan's 'Substitute Prison' Shocks the World. Tokyo, JFBA. Available at:

(ii) the over-reliance of the court on confession evidence which risks encouraging the use of torture to extract confessions and which has been repeatedly criticised as unreliable in cases of persons with mental illness, personality disorders or intellectual disabilities ;[49] (iii) the lack of mandatory appeal in death penalty cases; (iv) the de facto process of "social extinguishment"[50] of the convicted prisoner; (v) prolonged solitary confinement and other harsh conditions to which the prisoner is subjected, in some cases for decades; (vi) the inadequate diagnosis and treatment of prisoners with mental illness; (vii) the lack of transparency and accountability.[51]

These concerns have been raised with the Japanese authorities by UN treaty monitoring bodies which have expressed concern at the failure of the authorities to respond to their concerns.

In 2002 the Japan Federation of Bar Associations published its recommendations on the death penalty system in Japan.[52] Raising its concern about the failure of the authorities to comply with the international standards prohibiting the death penalty for the aged and the mentally disabled, it suggested that even confirming mental disability in prisoners on death row "is impossible due to a lack of guarantee of their right to counsel and communication with the outside world, prior notification of execution date to the prisoners and their family members, and disclosure of information on a prisoner's mental condition".[53]

FORENSIC PSYCHIATRY

Forensic psychiatry is that sub-speciality of psychiatry in which professional expertise is applied to legal aspects of civil, criminal, and correctional or legislative matters bearing on mental health and behaviour.[54] There have been significant changes in the framework of forensic psychiatry in Japan over the past decade.[55] But there remain important changes to be introduced. A survey carried out between 2001 and 2004 by a working group of psychiatrists found inconsistency and ambiguity in criteria for competence evaluation and for the application of punishments to those with mental illness. Moreover there were regional differences in the format and content of competence evaluations.[56]

The concept of the forensic psychiatrist is evolving and needs to be strengthened. There has been an attempt to more effectively respond to mental health assessment and treatment of those accused of crimes with the introduction of a new law and more than 30 new forensic units being established in mental health settings to fulfil this role. However the current

http://w3.nichibenren.or.jp/en/activities/statements/data/daiyo_kangoku.pdf

49 Ibid.

50 DT Johnson (2006), p.73. This is characterized by the physical isolation of the prisoner; the restrictions on visits and contacts; the loss of family contact; the prohibition on talking to or even making eye contact with prison guards.

51 See discussion below pp.19-21.

52 JFBA. Recommendations on the Capital Punishment System. Tokyo: JFBA, November 2002.

53 Ibid. p.19.

54 See, for example, RI Simon, LH Gold (eds.). *Textbook of Forensic Psychiatry*. American Psychiatric Publishing, 2004; R. Rosner (ed.) *Principles and Practice of Forensic Psychiatry.* Arnold, 2003; in Japanese, see: Igarashi S (ed). *All about Criminal Psychiatric Examination*. Nakayama Shoten, 2008.

55 K Yoshikawa , P Taylor. "New forensic mental health law in Japan." *Criminal Behaviour and Mental Health*; 13(4):225-228, 2006.

56 T Hirata, N Nakajima, R Yoshioka, M Iimori, T Itoh, A Okae, et al. "Preliminary reports and psychiatric practice in correctional facilities." *Seishinkeishi* 106(12):1539-1582, 2004.

number of centres is unlikely to be able to ensure that the existing need is met. The identity of forensic psychiatry as a profession is still evolving in Japan and implementation of criteria for certification as forensic psychiatrist and the development of a professional association to speak for the profession would both improve the standard of forensic psychiatry and the avenues for reform.

FORENSIC EXAMINATIONS

Forensic examinations in death penalty cases can be of a simple or a formal nature. Simple evaluation (*kan-i kantei*) -- a short "one-off" assessment -- is intended to advise the prosecutor promptly on the state of mind of the accused and usually is carried out by a doctor known to the prosecutor. Lawyers interviewed by Amnesty International delegates said that doctors fulfilling this role were sympathetic to the prosecutor and gave the evaluations the prosecutor sought. Evidence to substantiate such an allegation is not easy to gather but the experience of one doctor suggests that it is plausible. The doctor recalled in a 2001 journal article that he had experienced pressure from a prosecutor to change his medical opinion following a simple evaluation he had conducted. When the doctor persistently refused to do so, the prosecutor stopped asking him to conduct simple evaluations in any further cases.[57]

The prosecutor in Japan can detain a suspect for up to 23 days to facilitate investigation under the *daiyo kangoku* [substitute prison] system and the simple evaluation is made during this period. In principle, a medical doctor nominated by the prosecutor can rule out a diagnosis of mental illness, opening the way for the detainee to be charged and tried. Neither the lawyers nor the accused can ask for an independent psychiatric assessment at the interrogation stage.

The formal assessment involves a more rigorous evaluation by a mental health specialist. Amnesty International was told by different lawyers that the accused or his or her lawyer in a capital trial does not have the right to ask for a formal forensic assessment of the accused in this early stage. This is only carried out according to the request of a court or prosecutor. It is usually during the interrogation process that the prosecutor seeks a diagnosis from a medical doctor. The court itself can also seek a medical doctor's examination. Doctors appointed for formal court-ordered diagnosis have considerable experience and professional standing.

If the simple evaluation does not rule out mental illness, the suspect may be referred to the formal procedure (*sei shiki kantei*) and sent to a hospital for assessment. After the end of pre-trial investigation or during trial formal testing is the only option. The resulting evaluation will either result in a finding of incompetence (in which case there will be no further trial) or one of competence (in which case a trial may proceed). Formal testing is a much longer process than a simple diagnosis at time of interrogation. Lawyers do not have access to the findings of the assessment and have no right to ask for an alternate opinion. The findings of simple testing will not be disclosed to the defence, although the result of formal testing may subsequently emerge in the context of proceedings. The prosecutor decides whether the information will be released or not.

Testing is not routine but at the request of the prosecution or judge. Roughly one in 20 death penalty cases in Japan involve psychiatric assessment.[58] In all cases, the assessment will be

57 N Nakajima (2001). "Criminal laws related to mentally handicapped and associated problems." *Seishin Shinkeigaku Zasshi* (Psychiatria et Neurologia Japonica) 103(9): 655-659.

58 Yasuda Yoshihiro, interview February 2009.

carried out by a psychiatrist chosen by the court -- an independent psychiatrist will not play this role and only exceptionally will be able to contribute to court proceedings.

Judges are said to dislike formal testing since the process takes an extended time (generally three months); findings are often challenged in court; and it is considered to prolong the trial process. Recently, courts have been trying to coordinate assessment between state and defence experts.[59]

The diagnosis made during assessment is advisory to judges – they are not bound to accept it. Competence is a legal definition and the judge will decide based on psychiatric evidence and other factors related to the crime and the accused. Different judges are in charge of (i) the interrogation stage of the procedure, and (ii) the trial stage, and each judge may independently seek evaluation of competence.

Prison doctors are forbidden from disclosing information to prisoners or to their lawyers. Formal questions from lawyers for information are responded to via the prison director. The Japan Federation of Bar Associations (or a local bar association) or the court can ask the prison warden about the health condition of the accused.

THE DEATH PENALTY IN JAPAN - SNAPSHOT 2009

Prisoners with death sentence finalized by Supreme Court:		**97**
Finalized prisoners' age range:	youngest oldest	**26**; **85**
Prisoners awaiting results of appeals in lower courts:		**59**
Number of prisoners executed: 1979-2008:		**89** (all male)
Number of mentally ill prisoners executed:	Information not available	
Age of prisoners executed since 1979:	youngest oldest	**36** **77**
Time between conviction and execution:	shortest longest	**03** years **30** years
Number of mentally ill prisoners on death row: information not available		
Number of prisoners exonerated and released since 1979:		**04**
Number of prisoners permanently exempted from death penalty on appeal on mental health grounds:		**00**

There is sometimes disagreement between medical experts providing opinion to the prosecutor and those acting for the defence. For example, in the case of Matsumoto Chizuo,[60] five medical experts, acting at the request of lawyers rather than the court, concluded that he was incompetent. Two doctors consulted by the prosecutor said he was able to understand proceedings. The court then ordered a formal assessment and based on the court-appointed expert's findings, ruled that he was competent. (Where assessment other than that requested by the court is possible it is likely to take place under inadequate conditions with a lack of

59 Ibid.

60 Former leader of the religious organization *Aum Shinrikyo*, now known as *Aleph*; Matsumoto is also known as Asahara Shoko.

time and the possibility of tape-recording interviews. It is probably not surprising therefore that judges consistently accept the conclusions of the experts they appoint.)

Challenging a finding of competency is usually difficult under the Japanese system. There have only been two cases where competence to stand trial (procedural competence) has been successfully challenged:

- Horie Morio: his case was suspended between 1992 and 1997 after the Petty Bench of the Supreme Court ruled he was incompetent. His case is discussed in more detail below [pp. 27]

- Seiha Fujima: he appealed a finding of competence and then withdrew his appeal. His decision to withdraw his appeal was challenged by his lawyer. The court found him incompetent to withdraw his appeal and led to an 18-month suspension of his case. Then the court found him competent. The Second Instance court found him competent and the Supreme Court confirmed the death sentence in 2004. He was executed on 7 December 2007 at Tokyo Detention House.

ACCESS TO AND INDEPENDENT MONITORING OF DEATH ROW

Because of the vulnerability of prisoners to violations of their human rights, there is a need for both a strict application of the rule of law and for transparency and accountability in the procedures taking place within places of detention. An informal level of transparency might be provided by assuring visits by family and friends of prisoners, as well as by their lawyers (though rarely independent doctors). However, the limits placed on visits, the extent of isolation of the prisoner and the difficulties faced by lawyers in getting information all conspire against this role in Japan.

In 2006, the government introduced a new system of prison visiting by inspection committees composed of doctors, lawyers and other citizens.[61] The function of these visiting committees has yet to be fully evaluated. Amnesty International believes that they represent a positive step forward, but they have limited powers and see a small percentage of prisoners (sometimes in the setting used during prison visits with a glass barrier between the visitors and the prisoners they are meeting). Visits without notice or at a time of the committees' choosing are not usually granted. The presence of a doctor and a lawyer in the visiting committees is a welcome step. However, given the scale of mental health problems in prisons, inclusion of mental health expertise would be a useful additional resource.[62] The powers of the committees appear very weak[63] when compared with those envisaged under the

61 These committees appear to correspond to the inspection mechanism called for in the UN Standard Minimum Rules for the Treatment of Prisoners, article 55. The committees are composed of a doctor nominated by the prefectural medical association, a lawyer nominated by the local bar association and 3-5 other local officials.

62 Doctors confirmed to AI delegates that the toll of mental disorder in Japanese prisons is significantly higher than in the wider society, a finding consistent with international data.

63 The HRC in the concluding observations of its 2008 report noted at conclusion 20: "The Committee is concerned that the Penal Institution Visiting Committees, the Detention Facilities Visiting Committees established under the 2006 Act on Penal Detention Facilities and Treatment of Inmates and Detainees, the Review and Investigation Panel for Complaints from Inmates of Penal Institutions reviewing complaints that have been dismissed by the Minister of Justice, and the Prefectural Public Safety Commissions responsible for reviewing complaints, petitions for review and reports of cases submitted by detainees lack the independence, resources and authority required for external prison or detention monitoring and complaint mechanisms to be effective. In this regard, it notes the absence of any verdicts of guilt or disciplinary sanctions against detention officers for

Optional Protocol of the Convention against Torture.[64] Even existing national mechanisms such as the United Kingdom's system of prison inspection[65] have powers that allow for an independent approach to inspection and public reporting of findings.

Attempts by external visitors (other than family members and lawyers) to see prisoners on death row in Japan are routinely denied. Members of the Diet [parliament] have long been denied access though in 2003 a delegation of Japanese parliamentarians received the authorisation of the Justice Minister on 22 July 2003 to visit the new gallows in Tokyo prior to their use. The parliamentarians, members of the Diet's Judicial Affairs Committee, were the first "outsiders" to inspect execution chambers since 1973.[66] Foreign visitors also have been routinely barred from seeing prisoners on death row. In 2001, Gunnar Jansson, Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe, was denied access to death row.[67] In 2002, the former European Commissioner for Humanitarian Aid, Emma Bonino, was also denied access to prisoners. She was told that a visit "could 'disturb the peace of mind' of the death row inmates".[68] A delegation from the Internationale des Ligues des Droits de l'Homme (FIDH) was denied access in 2002. Although an FIDH delegation was given a lengthy meeting with the Director of the Tokyo Detention Centre in 2008, delegates were still unable to see death row prisoners incarcerated there.[69] Amnesty International had the same experience in 2009. While prisoners should have the right to refuse to see visitors, the policy and practice in Japanese prisons is to limit the number of visitors to an absolute minimum and not give prisoners the option of choosing who to see.[70] This policy deprives prisoners of additional contact with people from outside the prison system and deprives people with legitimate interests in the functioning of the prison system from learning more.

The benefits of access and independent monitoring also arise with respect to medical care

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crimes of assault or cruelty during the period from 2005 to 2007 (art. 7 and 10).... The State party should ensure (a) that the Penal Institution and Detention Facilities Visiting Committees are adequately equipped and have full access to all relevant information in order to effectively discharge their mandate and that their members are not appointed by the management of penal institutions and police detention facilities; (b) that the Review and Investigation Panel for Complaints from Inmates of Penal Institutions is adequately staffed and that its opinions are binding on the Ministry of Justice; and (c) that the competence for reviewing complaints submitted by detainees is transferred from the Prefectural Public Safety Commissions to an independent body comprising external experts. It should include in its next periodic report statistical data on the number and nature of complaints received from prisoners and detainees, the sentences or disciplinary measures imposed on perpetrators and any compensation provided to victims.

64 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Available at: http://www2.ohchr.org/english/law/cat-one.htm. See also: Amnesty International's 10 Guiding Principles for the Establishment of National Preventive Mechanism. Index Number: IOR 51/009/2007, 12 October 2007.

65 Her Majesty's Inspectorate of Prisons for England and Wales is an independent (though government-funded) body which reports on conditions for and treatment of those held in prisons, young offender institutions and immigration detention facilities. The Chief Inspector is appointed from outside the prison service. See http://inspectorates.homeoffice.gov.uk/hmiprisons/

66 'Diet members tour execution chamber', *Japan Times*, 24 July 2003.

67 J Watts. Tokyo: Harsh criticism of Japan's treatment of death-row prisoners. *Lancet*; 357:941, 2001.

68 *Kyodo News* 26 January 2002.

69 FIDH. *The Death Penalty in Japan, A Practice Unworthy of a Democracy*, Paris 2003; FIDH. *The death penalty in Japan: the law of silence, going against the international trend,* Paris, 2008, p.5.

70 Standard Minimum Rules for the Treatment of Prisoners provide, at rule 37, that "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."

and research. In contrast to the situation in Japan where up until now there have been formidable barriers to independent medical investigation, research in the USA on medical, legal and social science aspects of mental health and the death penalty has been considerable. It has included studies on social issues such as race and executions, the impact of executions on the families of condemned prisoners, the mental health status of prisoners on death row, and the ethics of medical participation in a wide variety of actions associated with the death penalty. In addition the death penalty system includes provision for the evaluation of mental health and mental capacity, leading to information being available to accused prisoners and lawyers.[71]

Transparency on the application of the death penalty is among the fundamental due process safeguards that prevent the arbitrary deprivation of life. Transparency includes the need for a public trial and sentencing, adequate notice to defendants of their substantive and procedural rights, notice to defendants, their families and their legal representatives regarding the death sentence and the timing of execution. At a general level, transparency serves the purpose of enabling the public to make an informed evaluation of the use of the death penalty and of the administration of justice in general.

In 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions issued a strong critique of Japan's lack of transparency on the death penalty. The substantive points of his criticism do not appear to have been addressed seriously in the three years since his report appeared though some information is provided to the public (such as the names of executed prisoners) and the government provides information to UN bodies such as the Human Rights Committee and the Secretary-General's Quinquennial report on the death penalty.[72]

EXCLUSIONS FROM THE APPLICATION OF THE DEATH PENALTY

As noted above (p.9) international human rights standards require that certain categories of people are excluded from the application of the death penalty, including pregnant women, young people under 18 at the time of the offence, and people with mental disabilities. These exclusions reflect both humanitarian concerns and the need for penalties to take into account criminal responsibility. In the case of young people under 18 and those affected by mental disability, it is widely recognized that these two categories of offender may not have the level of responsibility for their crime that merits the maximum level of punishment (or in some cases any punishment at all).

Concepts of criminal responsibility, mental competence and diminished responsibility are widely shared notions in the operation of the criminal justice system in most parts of the world that have a functioning justice system.[73] Japanese law takes account of competence in the criminal justice sector in three ways or at three stages. The first level of competence is that related to responsibility for actions -- criminal responsibility. Lawyers whom Amnesty

71 While the US criminal justice system is considerably more open than the Japanese, there remain major flaws in the functioning of the US death penalty system -- see, for example, the reports of Amnesty International (available at www.amnesty.org) and the critical reports available at the Death Penalty Information Center website (www.deathpenaltyinfo.org). However, the availability of a wide ranger of information, including judicial opinions, contributes to the debate and discussion on the death penalty in the USA.

72 ECOSOC. Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. Report of the Secretary-General. UN Doc E/2005/3.

73 R Hood, C Hoyle. *The Death Penalty: A Worldwide Perspective*. Fourth Edition. Oxford University Press, 2008.

International interviewed explained that a person accused of a capital offence such as murder might be evaluated for competence at the request of the judge or the prosecutor during interrogation. Defence lawyers would not have a right to seek such an evaluation. If questions arose about the mental competence of the defendant at the point of trial, a judge, prosecutor or defence lawyer might seek an evaluation of the prisoner.

The second level of competence relates to the capacity of the accused to participate in legal proceedings. This is known in Japan as procedural competence. It is characterized by a capacity to be able to understand the nature of the charge, to communicate coherently with lawyers, to assist in his or her own defence and to make rational decisions with regard to the conduct of appeals. Article 314 of the Code of Criminal Procedure specifies that legal processes should be suspended in cases where "the accused is in the condition of mental derangement".

The third level of competence corresponds to the notion of fitness for punishment or execution. The Code of Criminal Procedure specifies at Article 479(1) that: "if a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice."[74] This legal provision is rarely used. One lawyer expressed pessimism to Amnesty International delegates when he was asked if Article 479 might be the basis for an appeal for retrial in the case of his mentally disturbed client. He had serious grounds for his pessimism. The suspension of a death penalty case on the grounds of mental incapacity following a lower court conviction has occurred only twice -- in the cases of Horie Morio [see below, p.40] and Seiha Fujima – and then only for reasons of procedural competence. There has never been a suspension of a death sentence because of incompetence for execution under the terms of Article 479 of the Code of Criminal Procedure.

It appears that successive Ministers of Justice have simply ignored the clear responsibility placed on them by Article 479, which is not a discretionary power but a duty. Given the irreversible outcome of an execution, it is incumbent on Ministers to demonstrate that competent and transparent procedures have been followed that would ensure that a prisoner is not executed when his or her mental health has been seriously compromised during detention following the criminal trial and appeal process.

AGE AND EXECUTIONS

In Japan, the age of a prisoner is a factor in determining whether or not he or she is liable to be sentenced to death. Japanese law conforms to international law proscribing the imposition of a death sentence on anyone under 18 at the time of the commission of the crime for which they are being sentenced.[75] In practice, Japan regards persons under 20 as juveniles, and death sentences imposed on those aged 19 are rare.

However, the application of the death penalty seems to be applied disproportionately against older prisoners. In the three years between January 2006 and January 2009, 32 men were executed in Japan. Of these, 15 were under 60 and 17 were older than 60. Five of this older group were in their 70s, including one aged 77 and a 75-year-old man who had to be taken in a wheelchair to be hanged. These are among the oldest executed prisoners in the world. Some countries have an upper age limit for executions, as recommended in the ECOSOC

74 See Appendix 1 for relevant extracts from Japanese criminal law.
75 Convention on the Rights of the Child, article 37.

resolution on implementation of the safeguards of 1984.[76] Japan does not. One prisoner –– Hirasawa Sadamichi –– died on death row in 1987 of natural causes, aged 95. Currently, Okunishi Masuru, remains on death row at the age of 85, along with two others in their 80s.[77]

A survey of prisoners carried out in 2008 by the NGO, Forum 90, recorded the age range of the 74 death row prisoners who responded. One prisoner was in his 20s; 20 were in the 30-49 year age range; and 53 -- around two thirds -- were in the 50-89 year age range.[78]

With prisoners of advanced years, there are concerns about the nature and quality of geriatric care available and the possible impact on the prisoner's competence of dementia and other disorders associated with older age.[79]

PLACES OF EXECUTION IN JAPAN

Of the 75 prisons and detention houses in Japan, seven are equipped to carry out executions. These correspond to the locations where a High Court sits: Fukuoka, Hiroshima, Nagoya, Osaka, Sapporo, Sendai, Takamatsu and Tokyo. (Although there is a High Court located in Takamatsu, the detention house in Takamatsu is not equipped to carry out executions and any prisoner sentenced to death there are sent to Tokyo.) The Tokyo Detention House has the largest number of prisoners awaiting execution – around half of those sentenced to death in Japan.

SENTENCING AND IMPRISONMENT

As of January 2008, there were 187 institutions in the Japanese corrections system, comprising 60 prisons, eight juvenile prisons, seven detention houses, eight prison branches, and 104 branch detention houses. More than 19,000 staff provided services to or supervised some 80,000 inmates. Prisoners aged 60 and over more than doubled between 1996 and 2006 and constituted about one in ten prisoners. [80]

In only a small fraction of homicide cases resulting in a conviction is the death penalty

76 ECOSOC resolution 1989/64, 24 May 1989: Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. This called for states to establish "a maximum age beyond which a person may not be sentenced to death or executed"; ECOSOC did not itself specify the age limit .Taiwan sets the limit at 80, Sudan does not execute anyone over 70; Kazakhstan (abolitionist for ordinary crimes) sets a limit of 65; Russia (abolitionist in practice) also sets a limit of 65; and Mongolia, Uzbekistan and Guatemala do not execute people over 60. R. Hood, C. Hoyle (2008). *The Death Penalty: A Worldwide Perspective.* Fourth Edition. Oxford: Oxford University Press, p.194.

77 Okunishi Masuru was found not guilty by a court of first instance but higher courts reversed this finding on appeal. He is currently seeking a retrial.

78 Forum 90 (2009), *Inochino akariwo kesanaide: Shikeishükara anatahe.* [Don't erase the light of life: From death row inmates to you.] Tokyo: Inpacto shuppankai.

79 For discussion of the situation in the USA (where a 91 year old man awaited execution) see: M Vandiver, D Giacopassi. Geriatric executions: growing old and dying on death row. Paper presented at the annual meeting of the American Society of Criminology, 14 November 2007.

80 Corrections Bureau, Ministry of Justice (2008). Penal Institutions in Japan, Tokyo,p.5, available at: http://www.moj.go.jp/ENGLISH/CB/cb-02.pdf).

imposed.[81] The government told the UN Human Rights Committee that the death penalty is imposed only for serious crimes such as murder, and in practice the number of prisoners sentenced to death each year is small. [82]

LIFE ON DEATH ROW

Despite the difficulties involved in research into strict penitentiary regimes where detainees sentenced to death are held, there is much information, predominantly from the USA, identifying factors that are likely to cause deterioration in a prisoner's health, including mental health. These include isolation, lack of stimulus, lack of exposure to fresh air and light, harassment, limitation on visits, threat of disciplinary punishments, and the prolonged period of detention, together with the knowledge of impending execution.[83]

The negative impact of isolation on the health and mental state of detainees has been noted at least since the 19th Century. For example, in 1854 the chief physician for Halle Prison in Germany observed "prison psychosis" among prisoners held in isolation and recommended that, because of the "very injurious effect" of isolation, the practice should be terminated.[84] Studies in the USA, Britain and elsewhere have made similar findings. A Canadian study characterized a "confinement psychosis" as a "psychotic reaction characterised frequently by hallucinations and delusions, produced by prolonged physical isolation and inactivity in completely segregated areas".[85]

LANDMARK COURT CASES

In other jurisdictions there have been important rulings relating to conditions and length of stay on death row. The quality of life on death row was the basis for a landmark decision by the European Court of Human Rights (ECHR) in the case of *Soering v United Kingdom*.[86] Jens Soering was sought by the state of Virginia in the USA on a charge of murder. His application was based on a number of concerns, among which were conditions experienced by death row prisoners in Virginia.

In its judgement delivered 7 July 1989, the ECHR noted (at para 106) that "However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that 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."

81 Japan has an overall conviction rate of greater than 99% of all prosecutions. The conviction rate in murder prosecutions is around 95%. In 2005, only 1.3% of prisoners convicted of homicide and 1.6% of prisoners convicted of robbery causing death were sentenced to death. (White paper on crime 2006 Part 2, Chapter 3, Section 2(1); available at: http://hakusyo1.moj.go.jp/).

82 Human Rights Committee. Consideration of reports submitted by states parties under article 40 of the Covenant. Fifth periodic reports of States Parties. Japan. CCPR/C/JPN/5, 25 April 2007, Para. 128

83 MD Cunningham, MP Vigen (2002). Death row inmate characteristics, adjustment, and confinement: a critical review of the literature. *Behavioral Sciences & the Law*, 20, (1-2):191-210;

84 This example was cited, together with other examples in S. Shalev. *A Sourcebook on Solitary Confinement.* London: Mannheim Centre of Criminology, p.10. Available at: www.solitaryconfinement.org

85 GD Scott, P Gendreau. Psychiatric implications of sensory deprivation in a maximum security prison. *Canadian Psychiatric Association Journal*;14(4):337-41, 1969, cited in ibid.

86 European Court of Human Rights. *Soering v United Kingdom* 11 Eur. Ct. H.R. (ser. A) (1989)

In the subsequent paragraph, it added that while security needs may make stringent conditions justifiable in principle, "the severity of a special regime such as that operated on death row in Mecklenburg [Virginia] is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years."

The court held unanimously that "in the event of the [British] Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3" [which states: " No one shall be subjected to torture or to inhuman or degrading treatment or punishment."]

Jens Soering was eventually extradited to the state of Virginia after that state provided assurances that the death penalty would not be applied.

In a second case, *Pratt and Morgan v the Attorney General of Jamaica* (1993)[87], the Privy Council of the UK House of Lords ruled that in "any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment' and that the death sentence should be commuted to life imprisonment." Subsequently, prisoners on death row within the jurisdictions of the Privy Council had their death sentences commuted to life imprisonment and the application of the death penalty decreased dramatically.

Prison conditions experienced by those under sentence of death in Japan are harsh and breach Japan's obligations under the International Covenant on Civil and Political Rights.[88] Prisoners are prohibited from talking to other prisoners -- a restriction enforced by strict isolation. Contact with the outside world is limited to infrequent and supervised visits from family, lawyers or other approved visitors. Visits can last from five to 30 minutes at the discretion of the Prison Director. A guard is always present during visits. Prisoners may send one letter of up to seven pages per day. In principle, prisoners may receive letters from any source but supportive letters from the public will not be delivered. Both outgoing and incoming correspondence are subject to censorship. Death row prisoners are not allowed to watch television or to undertake personal projects or activities though they can undertake work voluntarily. [The government claims in its 2007 submission to the Human Rights Committee that death row prisoners can watch videos but human rights monitors report that they are unaware of any change in practice relating to television.] Prisoners are reportedly allowed three books subject to approval. Exercise is limited to two short (30 minute) sessions per week outside their cells in summer and three times a week in winter.[89] 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.

87 *Pratt and Morgan v the Attorney General of Jamaica* (1993). Privy Council Appeal No. 10 of 1993; Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered 2 November 1993.

88 This is the view of UN bodies such as the Human Rights Committee (Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.28, 5 November 1993, comment 4. Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.102, 19 November 1998, para. 23. UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 21) .Non-governmental organizations such as Amnesty International also believe that Japan is in breach of international treaty obligations.

89 During a visit to Tokyo Detention House (TDH) in April 2009, Amnesty International delegates saw single exercise cells that are approximately 2m by 5m with a convex wire mesh forming the roof of the cell; it is not possible to see the terrain outside the prison because of the heavy grille on the external wall that allows no view from anywhere except from a kneeling or bending position immediately adjacent to the wall (in which case the sky is all that is visible). There may be other exercise areas in the Detention House having even less openness to the external world that Amnesty International delegates did not see. (Delegates were told by TDH staff that exercise sessions were possible on a daily basis.]

Prisoners' opportunities for social contact are not only limited by the strict rules but, in many cases, by the exclusion imposed on them by families who cease or restrict their visits. In some cases, the prisoner himself refuses visits for whatever reason (see case of Hakamada Iwao below) although in such cases it is difficult to verify the prisoner's views or the reasons for refusing visitors.

THE EXECUTION

The process of execution has been described in a series of articles in 2008 in the Japanese daily paper, the *Yomiuri Shimbun*.

"The Tokyo Detention House's execution room is divided in half by blue curtains. On an altar near the front wall, a Buddhist statue and a cross are placed. In the rear, a three-centimetre-thick rope is hung, and there is a square footboard with 110-centimeter sides on the floor, which opens with the press of a button."[90]

The condemned is made to stand on a trapdoor at the centre of the execution room, and then a rope is placed around his neck.

"Three prison officers in a separate room simultaneously push execution buttons, one of which opens the trapdoor. Another officer is in charge of keeping the rope from swinging due to the downward impact of the prisoner on the gallows."

According to the newspaper's informant, the prisoner's neck fractures and breathing stops but the heart continues beating. The paper quoted a medical doctor who has witnessed several executions, as saying that the heart stops beating an average of 15 minutes after hanging.

"The trapdoor is about four metres above the floor beneath the gallows. After the hanging, a doctor listens to the prisoner's heartbeat with a stethoscope, using a stepladder to reach the height of the chest of the hanged."

When the doctor declares the prisoner's heart has stopped, the execution process officially concludes.

"The body of the hanged is then toweled off before being dressed in white."[91]

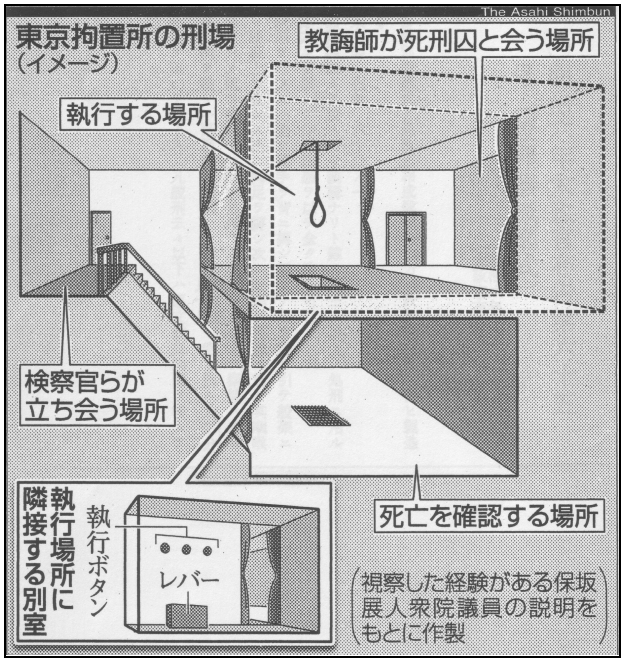
In one revealing paragraph on article 6 of the ICCPR contained in its fifth periodic report to the UN Human Rights Committee submitted in 2006, the government noted that:

> "It is easy to imagine that inmates on death row will feel extreme anxiety and anguish because of the nature of their detention, and therefore the warden of the detention house has the authority to impose some restrictions on them in order to protect the mental stability of the inmates."[92] (Para 133 (emphasis added).)

90 This and subsequent quotations in this box from: D McNeill and the *Yomiuri Shimbun* (2008), "Unmasking Capital Punishment: A Wave of Executions, The Yomiuri and Japan's Death Penalty," *The Asia-Pacific Journal: Japan Focus* Vol. 47-3-08, 18 November 2008. Available at http://www.japanfocus.org/-David_McNeill__Yomiuri/2953.

91 Ibid.

92 Human Rights Committee. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Fifth periodic reports of States parties due in 2002; Japan, 20 December 2006. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs94.htm.



This is a sketch of the execution chamber in the Tokyo Detention House published in the *Asahi Shimbun*, 10 March 2009, based on the recollections of Hosaka Nobuto, a member of the Japanese Diet who has visited the chamber. (No official illustration or information about the chamber is available.) In the top right of the picture is the execution chamber with an area to the right where the prison chaplain can meet the prisoner. In an adjacent room (illustrated in the bottom left of the picture) are three buttons; three staff press these buttons simultaneously but only one activates the hanging. To the left of the execution chamber is the witness area. The prosecutors view the prisoner with the noose around his neck; the curtains are then closed and the execution carried out. Below the execution chamber the body is examined by a doctor who pronounces death. © Asahi Shimbun

The report then went on to state that these powers are rarely imposed and that most death row prisoners can consult lawyers and see visitors.

All the information available to Amnesty International[93] suggests that prisoners are subjected to a regime of particular harshness, limiting their opportunities for social contact with family and friends, excluding the possibility of contact with fellow prisoners, preventing discussion with prison staff,[94] limiting and censoring correspondence, preventing almost all human touch, limiting educational opportunities and preventing prisoners from freely choosing reading or video material. Prisoners who breach disciplinary rules -- by, for example, moving within the cell at times when this is prohibited, making a noise or otherwise creating a disturbance -- may be subjected to detention in a punishment cell where conditions are even harsher than in the normal cell. Prisoners with mental illness may be vulnerable to punishment because their behaviour is less likely to be subject to self-discipline than other prisoners.

The government submitted to the Human Rights Committee that:

> "Those inmates sentenced to death face an extremely painful mental burden in facing their own death; hence the penal institution must ensure the mental and emotional stability of the said inmate as well as secure the custody of the inmates. Under Article 36 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, inmates sentenced to death are to be placed in a single room throughout day and night and are not permitted, in principle, to make mutual contacts even in the outside of the inmates

93 Information gathered from interviews with lawyers, NGOs and from published reports.
94 Even making eye contact with staff is prohibited.

> rooms. However, if it is deemed advantageous to help the inmate maintain peace of mind, they may be permitted to make mutual contacts.
>
> In order for the inmates sentenced to death to avoid suffering from loneliness [they are permitted a greater range of items] than those permitted for [other] inmates, and opportunities are given them to watch videos or television programs."[95]

In a parallel report on the Japanese government's report to the Human Rights Committee, the Center for Prisoners' Rights (CPR) commented on the reforms introduced in the new prison law, noting the positive changes that they could give rise to.[96]

The CPR saw positively the relaxation of the limitation on communication between inmates and persons other than family and lawyers. However they noted the wide discretion of the authorities in implementing the change. It was the authorities who decided whether someone contributes to inmate's "mental stability", for example. Thus, while the new provision on visitors could lead to a considerable improvement for the prisoner, in practice new restrictions are seen. According to the CPR, the authorities of all the seven detention centres that detain convicted inmates sentenced to death allow the inmates to submit the list of names of five people they wish to meet or exchange letters with; the authorities scrutinize the names and then typically approve three of them as visitors or correspondents. However the new law does not place a limit on the maximum number of people whom an inmate can contact. The CPR believes that such a practice represents the creation of a new rule outside the law which will limit the possibilities of prisoners meeting potential advocates beyond their existing legal advisers.

95 Human Rights Committee. Replies to the List of Issues (CCPR/C/JPN/Q/5) to be Taken Up In Connection With The Consideration Of The Fifth Periodic Report of The Government of Japan, (CCPR/C/JPN/5), 22 September 2008, p.20. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs94.htm.

96 Center for Prisoners' Rights (2008). The Alternative Report on the Fifth Periodic Reports of the Japanese Government under Article 40 of the International covenant on civil and political rights. Tokyo. September 2008.

In a separate parallel submission to the Human Rights Committee, the Japan Federation of Bar Associations noted that, although the new prison law permits group interaction of death row prisoners, it has seen no evidence of such a change in practice.[97]

NOTIFICATION OF EXECUTION

The one aspect of the death penalty in Japan that has particularly serious implications for human rights is the practice of only informing the prisoner of their impending execution on the morning of the hanging.[98] This cruel practice leads all death row prisoners to face – every day – the question: "will this day be my last?"[99] It is justified by the authorities by reference to the need to protect the prisoner and preserve his or her peace of mind.

> The date of execution is notified to the inmate on death row on the day of the execution. One of the reasons for this is the belief that notifying the inmate on a day that precedes the date of execution will have significant impact on the emotional state of the inmate, making it difficult for the inmate to maintain a calm state of mind.[100]

97 Japan Federation of Bar Associations, "Update Report in response to the List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of Japan", p.18; available at: http://www2.ohchr.org/English/bodies/hrc/hrcs94.htm.

98 Amnesty International delegates were told during a visit to the Ministry of Foreign Affairs in April 2009 that this policy was introduced after there had been a number of suicides of prisoners following advance notification of their execution date.

99 Amnesty International. "*Will this day be my last?" The death penalty in Japan*. Index: ASA 22/006/2006, 2006.

100 Human Rights Committee. UN Document CCPR/C/JPN/5, para 135.

© AI. Tokyo Forensic Unit is one of more than 30 such units throughout the country established to allow for the evaluation of the mental health of detainees. The majority of residents in the Tokyo Forensic Unit are diagnosed with schizophrenia.

The policy also affects families of death row prisoners who are not told of the execution until after it has occurred. In one case, a mother arrived at the prison to visit her son to be told to come back later. When she did, she was told that he had been executed.[101] Again the rationale for this cruel policy is explained in benevolent terms for both family and prisoner:

> the family may experience unnecessary mental anguish if they are notified of the date of execution beforehand; and if the inmate on death row learns of his/her date of execution during a meeting with family members who have been notified, as in the case where the inmate is directly notified, there will be a significant impact on the emotional state of the inmate, making it difficult for the inmate to maintain a calm state of mind. [102]

During the Universal Periodic Review in 2008 the Japanese delegation described the current practice of minimal notice of impending execution as "inevitable", since inmates could become emotionally unstable and could suffer serious emotional distress if they are notified in advance of the exact date.[103]

This policy has been criticized by UN bodies, by the Council of Europe, by international NGOs and by Japanese human rights advocates.[104] The Human Rights Committee, for

101 Case of Kimura Shuji. See Amnesty International. *"Will this day be my last?",* p.5.

102 Human Rights Committee. UN Document CCPR/C/JPN/5, para. 136

103 UN. Report of the Working Group on the Universal Periodic Review: Japan. Document A/HRC/8/44, 30 May 2008, Para. 59. Available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/JP/A_HRC_8_44_Japan_E.pdf

104 See reports from UN Human Rights Committee. Concluding Observations. Japan. UN Doc CCPR/C/JPN/CO/5, 18 December 2008; Council of Europe, Parliamentary Assembly. Resolution

example, has recommended "that inmates on death row and their families are given reasonable advance notice of the scheduled date and time of the execution, with a view to reducing the psychological suffering caused by the lack of opportunity to prepare themselves for this event." [105]

In April 2009, the *Asahi Shimbun* newspaper reported that a government committee had recommended to the government that death row inmates should be given at least one day's notice of their impending execution instead of being told on the day they are to be hanged.[106] The panel was reported to have concluded that "The practice of notifying death row inmates on the morning of their execution creates unnecessary anxiety that is with them every day." This appears to demonstrate that the authorities are aware of the anxiety provoked by this practice but that relief of this anxiety should only be very minimal. It fails completely to meet the concerns raised by UN treaty bodies and the Special rapporteur on extrajudicial, summary and arbitrary executions.

1349 (2003): Abolition of the death penalty in Council of Europe Observer states, adopted 1 October 2003; reports by FIDH and Amnesty International cited in notes 1,2 and 19 above; see reports by JFBA and CPR cited above notes 9, 48, and 52 ; see also R Hood and C Hoyle. Op cit. [See note 77]

105 See Human Rights Committee. Concluding observations on Japan, CCPR/C/JPN/CO/5, 2008.

106 'Japan May Provide Notice for Execution of Inmates, Asahi Says'. *Bloomberg News*, 2 April 2009.

3/HEALTH CARE FOR DEATH ROW PRISONERS

The defining characteristic of death row prisoners in Japan, apart from the crime for which they have been convicted, is their isolation. They are isolated from other prisoners, isolated from the guards who are forbidden to converse with them, and isolated from the outside world.[107] Their isolation from the external world is compounded by the commonly seen rejection of death row prisoners by their families and the limited number of visitors they have. A survey conducted by the JFBA in 2006 found that around one quarter of the 79 death row inmates polled said they had no regular visitors. One had not had a visitor for 17 years, and 11 said they had no visitors for more than a year.[108] A similar survey in 2008 also documented a lack of visitors.[109] Health care falls within this wall of isolation. In principle, medical care for death row prisoners should follow the procedures applying to other prisoners. Typically the initial contact between health staff and the prisoner would be mediated by the "quasi nurse" -- a prison guard who has been trained in basic nursing functions.[110] This nurse would collect medical complaints and assess them for referral to the doctors. The doctors would then see the prisoners and provide treatment if needed. Provision of health care is discussed further below.

Apart from any problems arising in the provision of health care within the prison, there is a barrier between the prisoner's health and the outside world. Lawyers seeking information about the health of their clients (with their consent) find this difficult. Direct contact between lawyers and the medical staff is not permitted and does not occur. The prison director exercises his discretion in the release of medical information. An extreme case of this was recently considered by Japanese courts. In this case, a lawyer acting for Ujigawa Tadashi (b. 1951) requested the Director of the Tokyo Detention House (through the Daini Tokyo Bar Association) to disclose the client's medical records including the record kept by Maebashi Prison, where Ujigawa Tadashi had been detained prior to being transferred to Tokyo Detention House. According to regulations applicable at the time, when a prisoner was transferred, the record kept by the previous prison had to be transferred to the next prison, along with the prisoner himself. However, administrations of Maebashi Prison and Tokyo Detention House both said that they had no record on Ujigawa's medical treatment given by Maebashi Prison. Ujigawa Tadashi himself requested the Kanto Regional Correction Headquarters to disclose his medical records held in Tokyo Detention House. When this request was refused, Ujigawa Tadashi's legal representatives filed a lawsuit to Tokyo High Court. When the suit was denied they appealed to the Supreme Court which rejected the appeal without substantial reasoning on 4 June 2009.

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107 In practice, the prison administration has considerable power to determine how prison rules are to be implemented and in practice prisoners are kept in harsh conditions with limited possibilities of external contact.

108 Associated Press report in *Japan Times*, Thursday, 6 April 2006. This exclusion continues after death. The majority of bodies of executed prisoners are unclaimed by families (though the short time given to families to collect the remains may account in part for this).

109 Forum 90. *Inochino akariwo kesanaide: Shikeishükara anatahe.* [Don't erase the light of life: From death row inmates to you.] Tokyo: *Inpacto shuppankai*, 2009.

110 AI was told that there were also some "quasi-nurses" who had in fact qualified as trained nurses. The Japan Nursing Association told Amnesty International that "quasi nurses" qualified for membership of the Association.

The basis for the refusal of the authorities to disclose the medical records appears to be a result of a restrictive, indeed perverse, interpretation of Japanese privacy law (Act on the Protection of Personal Information Held by Administrative Organs). Privacy laws are intended to protect the interests of individuals concerned, whereas the prison authorities' refusal to disclose information clearly prejudice those interests. In their appeal to the Supreme Court Ujigawa's legal team submitted a statement from Daniel Metcalfe, the former Director of the Office of Information and Privacy of the United States Department of Justice. In his declaration, Daniel Metcalfe contended "unequivocally that a death-row inmate seeking his detention medical records for purposes of making such an argument in the United States would receive those records".[111] He added that "such a thing [refusal of information to a death row prisoner] is unimaginable under United States law, and it is difficult to imagine such a result being carried to finality in Japan."[112] The Council on Prison Administration Reform had already recommended that prison medical records should be disclosed to the individual prisoner concerned but noted that there was no system for assuring disclosure; they recommended that such a system needed to be established.[113]

Failure to provide relevant medical information to a prisoner or to the prisoner's legal representative appears to breach the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states in principle 26: "The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law."[114] While the principle gives quite a range of discretion to the state, the restriction of access to medical records in Japan (other than good practice relating to maintaining confidentiality and security) goes well beyond what is reasonable.

Health care in Japanese prisons is provided by doctors, nurses and "quasi-nurses" whose employment and supervision is the responsibility of the Ministry of Justice rather than the Ministry of Health, Labour and Welfare. (Attempts by Amnesty International delegates to meet the Minister of Health or others in the Health Ministry were turned down because, as an official explained, prisoners' health is not the responsibility of the Ministry of Health.)

Each prison has a medical director and subsidiary staff. One doctor told Amnesty International of his experience in one prison with short-term prisoners where there were 800-1000 prisoners served by six medical doctors (including two psychiatrists) and four "quasi-nurses". Twice a week "quasi-nurses" visited the cells and collected requests to see the doctor. The "quasi-nurse" selected the cases for consultation. International standards permit a prisoner or his or her counsel, "the right to request or petition a judicial or other authority for a second medical examination or opinion." This provision does not appear to be guaranteed to prisoners in Japan.[115]

111 Declaration of Daniel J Metcalfe. In the case of Ujigawa Tadashi, Supreme Court of Japan. Dated 14 September 2008.

112 Ibid., para.14.

113 Council on Prison Administration Reform. Report, December 2003. Available at http://www.moj.go.jp/KANBOU/GYOKEI/KAIGI/teigen.pdf [Japanese]. An English language summary of the findings is given in the White Paper on Crime 2004 Part2, Chapter4, Section1, para. 2; available at: http://hakusyo1.moj.go.jp/en/50/nfm/n_50_2_2_4_1_2.html

114 UN. BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OF IMPRISONMENT. ADOPTED BY GENERAL ASSEMBLY RESOLUTION 43/173 OF 9 DECEMBER 1988. AVAILABLE AT: HTTP://WWW.UNHCHR.CH/HTML/MENU3/B/H_COMP36.HTM.

115 See: Body of Principles for the Protection of All Persons under Any Form of Detention or

Beyond the medical services available in each prison, there are four "medical prisons" within the Corrections Department – Kitakyushu, Hachioji, Okazaki and Osaka -- and a further six that are designated as medical priority institutions.[116] These treat prisoners requiring care not available in the normal prison system.

A press report in March 2009 cited the Correction Bureau of the Justice Ministry as suggesting that at Japanese correctional facilities, 291 doctors were employed as of April 2008, short of the 332 deemed necessary for adequate medical service.[117] There was a shortage of doctors at 33 correctional facilities with no full-time doctors available at five of them.

Amnesty International delegates saw a diagnostic and medical consultation area within Tokyo Detention House during a visit to the facility in April 2009. This wing contained an X-ray and CT scanning capacity and a dental surgery. The other part of this wing was made up of doctors' examination rooms and small cubicles, each approximately 70cm by 90cm (estimated), where prisoners could be locked while sitting waiting for a medical consultation. The explanation for this practice, as for other restrictive measures in the Detention House, was the need for security.

While strenuous efforts are made to prevent prisoners talking to each other and to guards, even in the clinic area, conversations with medical staff are permitted. The clinical independence of the medical staff is uncertain since the prison director has final approval for medical and indeed all procedures in the prison. Moreover there are questions about the extent to which medical information is kept confidential. This is a particular concern with "quasi-nurses" who are both prison guards and health personnel. The fact that guards are present during consultations puts further pressure on the concept of medical confidentiality and clinical independence.

Amnesty International delegates were told by different sources that lawyers cannot get medical information directly from doctors in the prison but must submit a demand for information through a Bar Association which writes to the Prison Director. The Director in turn passes on the request to the prison medical staff and retains the right to modify the doctor's report when it comes back to him, prior to mailing it to the Bar Association. This does not reflect best practice elsewhere and raises serious concerns about access to information and transparency.

PRISONERS WITH MENTAL ILLNESS

The problems of identifying, understanding and treating mental illness in prisoners applies equally with prisoners awaiting execution. In addition to pre-existing mental illness that may

Imprisonment. "A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion." (Principle 25).

116 Ministry of Justice (2006). White paper on crime Part 2, Chapter 4, Section 2(4); available at: http://hakusyo1.moj.go.jp/. See also Ishikawa Yoshihiro (1994). "The treatment of mentally disordered offenders in Japanese medical prisons." *Japanese Journal of Psychiatry and Neurology* 48 Suppl. 85-95.

117 Some 90 out of 188 correctional facilities across Japan have affiliated medical clinics or hospitals. See Kyodo News Agency report, 3 March 2009, available at: http://theblackship.com/news/categories/crime/3050-Medical-doctors-sent-prisons-based-manpower-dispatch-law.html.

have been a factor in the crimes which led to prosecution, the harsh conditions faced by death row prisoners may lead to progressive mental deterioration and development of significant mental illness.[118]

A number of prisoners in Japan are reported to have been executed although mentally ill. Other possibly mentally ill prisoners remain on death row awaiting execution. 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 documentation to adjudge the mental state of those on death row. Attempts by Amnesty International to meet at least one prisoner in 2009 was refused, though a Diet member interviewed by Amnesty International delegates in April 2009 suggested that such a meeting may in principle be possible.

Lawyers are an important source of information on mental health since they may be one of the few persons visiting prisoners, apart from family members. [119]

Nakamichi Takeyoshi, the lawyer for Kawanaka Tetsuo (executed in 1993), told a journalist from the Japan Times:

> My client should not have been executed. In 1984, when the sentence was handed down, his mental condition was already questionable. When I met him [in 1989] he told me he was being dominated by computers and radio waves. During his detention, he was examined every six months and was given stabilizers [medication].[120]

There is no reliable information on the number of prisoners with mental illness who have been executed, though the cases of Mukai Shinji (executed 2003), Fujima Seiha (executed 2007) and Miyazaki Tsutomu (executed 2008) are cases in which there is a strong presumption of mental illness (see discussion of these cases above on p.5). Other current cases will be discussed below.

While it is important to acknowledge the difference between the concepts of mental illness and incompetence from a legal point of view, the secrecy attending death penalty procedures give rise to a lack of confidence in the evaluation of prisoners' mental health and the way this is taken into account by judges in assessing competence.

DECLINING OR WITHDRAWING APPEALS: A DEAD CERTAIN OUTCOME

In Japan there is no system of mandatory appeals in death penalty cases. This has the effect of placing prisoners on a fast track to execution if they decline to appeal and cuts short the

118 While research is lacking in Japan, there is evidence from the USA that suggests long term harsh imprisonment can have an affect on the prisoner's mental state. See, for example, L Rhodes. Pathological effects of the supermaximum prison. *American Journal of Public Health* 95:1692-5, 2005.

119 Prisoners can also nominate individuals from whom they would like to receive visits. These may or may not be approved by the prison authorities. Many death row prisoners are visited neither by family members nor by supporters. Limitations placed on visits have been criticised by the Human Rights Committee and the Japan Federation of Bar Associations, as well as by Amnesty International.

120 *Japan Times Weekly*, 17 April 1993, cited in: Human Rights Watch. *Prison Conditions in Japan*. New York, 1995, p.54. Available at: http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF

review process if they withdraw their appeals at any stage.[121]

Safeguard 6 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states that: "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."

Both the Human Rights Committee and the Committee against Torture expressed serious concern at the lack of a mandatory appeal system to for persons sentenced to death and recommended the introduction of such system.[122]

The case of Takuma Mamoru (b. 1963) illustrates the impact of the lack of mandatory appeal and the probable role of mental illness in hastening execution. Takuma Mamoru had been diagnosed at a young age -- by the beginning of the 1980s -- as suffering mental illness.[123] In 1984 he was charged with rape though the charge was subsequently dropped. During admission to a psychiatric hospital he jumped from the top of the hospital building and broke his jaw. He later discharged himself but was quickly apprehended in connection with two rapes. An earlier diagnosis of schizophrenia was confirmed. However when he was charged with rape, a psychiatric assessment determined that he suffered from personality disorder. He was convicted and sentenced to three years' imprisonment. Following his release he engaged in further criminal behaviour over the next decade though not being convicted due to his mental state. He was subsequently involuntarily admitted to a psychiatric institution where his diagnosis of personality disorder was revised to schizophrenia and then back to personality disorder. He was discharged, continued to show signs of deviant behaviour and disturbed mental state. In mid-2001 he attempted to hang himself. He survived but less than a fortnight later he stabbed 20 children and two teachers in a primary school; eight of them died.

Takuma Mamoru was tried and convicted in Osaka District Court and sentenced to death on 28 August 2003 in spite of his psychiatric history. He expressed a wish to die and did not appeal. He was executed on 14 September 2004, three years after the killings.

In other cases, prisoners commence appeal proceedings and then withdraw from the process, leading to the finalization of the death sentence and immediate liability to execution.

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121 Other legal initiatives to seek suspension of the death penalty, including applications for retrial and applications for pardons, are available, but they do not automatically stay an execution. During the public examination of Japan's periodic report to the Human Rights Committee in October 2008, a question from the committee sought clarification about the suspension of executions while retrial applications or appeals for pardon are being considered. The Japanese delegation replied that "if the application for the pardon could suspend the execution, repeated application would prevent the execution to ever take place, thus the result of the criminal trial would become impracticable." For this reason, the response continued, "it is not appropriate to suspend the execution of the death penalty for all those who requested the retrial or applied for the pardon." It is as a result of this position that there have been cases of prisoners being hanged while in the course of seeking a retrial. (See: Human Rights Committee. Replies to the List of Issues (CCPR/C/JPN/Q/5) to be taken up in Connection with the Consideration of the Fifth Periodic Report of the Government of Japan (CCPR/C/JPN/5), UN Document CCPR/C/JPN/Q/5/Add.1, 23 September 2008.

122 The Human Rights Committee recommended that Japan "introduce a mandatory system of review in capital cases and ensure the suspensive effect of requests for retrial or pardon in such cases" CCPR/C/JPN/CO/5. See also: Conclusions and recommendations of the Committee against Torture, Japan CAT/C/JPN/CO/1.

123 This account is drawn from K Yoshikawa, PJ Taylor. "Editorial. New forensic mental health law in Japan." *Criminal Behaviour and Mental Health* 13:225-228, 2003.

Studies and anecdotal evidence from the USA suggests that mental illness plays a significant role in the decision of prisoners to terminate appeals.[124] Similar research in Japan on factors leading to withdrawal of appeals would be impeded by the high levels of secrecy surrounding the death penalty.

DISCIPLINE AND THE MENTALLY ILL

According to the Japanese Department of Corrections "a certain percentage of inmates lack a sense of cooperation and lead extremely selfish lives. If we leave such inmates as they are, this may lead to victimization of the more sincere inmates. Thus, we are sometimes obliged to resort to disciplinary punishment when some inmates commit a disciplinary offence as a measure to make inmates reconsider their misdeeds."[125]

However, where prisoners are mentally ill it is likely that their illness will affect their behaviour and make them more likely to be punished for disciplinary infractions.. One lawyer told Amnesty International that a prisoner hitting the cell wall in frustration can lead to a week in a punishment cell. During this time, there is no access to a bath; prisoners must sit for 12 hours each day with breaks only for toilet visits; they have nothing to do but must look at the door.[126] Amnesty International delegates heard similar reports from other lawyers. The failure of the authorities to take into consideration the mental health of inmates when devising and applying disciplinary punishments exacerbates the harshness of the regime and should be remedied.

124 J Blume. "Killing the Willing: Volunteers, Suicide and Competency", *Michigan Law Review* 103: 939-1009, 2005.

125 Correction Bureau. *Penal institutions in Japan*. Tokyo: Ministry of Justice, 2008, p.21. Accessible at: http://www.moj.go.jp/ENGLISH/CB/cb-02.pdf.

126 Yasuda Yoshihiro. Interview, February 2009.

4/CASE STUDIES

The following cases are examined in some detail and raise questions about the adequacy with which courts and the Justice Ministry have taken account of mental health as a factor in the cases.

HAKAMADA IWAO

Hakamada Iwao (b.10 March 1936) was arrested and prosecuted on charges of murder in 1966. It was alleged that on 30 June 1966 he stabbed to death the manager of the factory where he worked and three other family members. He was arrested and interrogated for 20 days by police without a lawyer present. Under the *daiyo kangoku* (substitute prison) system, suspects can be detained for up to 23 days of questioning. There is no limit on the length of interrogation sessions, during which the detainees' lawyers have only restricted access to them.[127] Hakamada Iwao was tried in the court of first instance, Shizuoka District Court, on 11 September 1968. He retracted his confession and testified during the trial that police had coerced him into signing the confession. Nevertheless he was found guilty and sentenced to death. His appeal to the Tokyo High Court was subsequently heard and rejected in 1976 and a further appeal to the Supreme Court in 1980 was rejected and the death penalty confirmed.

© AI. Hakamada Hideko, sister of Hakamada Iwao, with some of the hundreds of letters he wrote to her until he stopped writing in 1991.

127 A Supreme Court ruling in 1988 illustrated the acceptability of prolonged interrogation. The Third Petty Bench in case no. 1985 (A) No. 826 (a robbery resulting in death) found that uninterrupted interrogation from 9.35 pm for nearly 22 hours to achieve a confession was acceptable in the circumstances.

Within months of the Supreme Court's judgment confirming his death sentence he began to show signs of seriously disturbed thinking and behaviour. His communication with his lawyers became ineffective[128] and his letters and verbal communication with his elder sister disordered.[129] He continued to write seriously disordered letters up until August 1991 at which time the letters made absolutely no sense, according to his sister, Hakamada Hideko. She told Amnesty International, "Shortly after his death penalty was finalized he used to write me every single day (he could send 7 sheets in an envelope) so I used to get letters every single day. He started to write strange weird nonsensical things but I thought it better that I got something rather than nothing. But then after some time, as the prison guard has to censor the letters, I imagine that the guard found it too cumbersome to have to read through all these nonsensical letters so I imagine that they told him not to write . . . ."[130]

Hakamada Iwao was permitted the very limited visits allowed to death row prisoners -- his sister and three members of a support group were allowed to visit him. However, in August 1994, Hakamada Iwao refused visits. For 12 years his sister was unable to see him, despite visiting the prison each month during this period. He started to accept her visits in November 2006, again refused visits for a year and then resumed contact again in 2007 until refusing again to see her (or any other visitors) until late 2008. Hakamada Hideko described to Amnesty International the process of visiting her brother in Tokyo Detention House:

> When I go for the visit I sign, give my name, address, state that I am his sister, present my ID, am given a number and after 30 minutes my number appears on an electronic board and I go up to the 10th floor… I am usually told to go into room number 5 for the visit and so I go into room number 5 and there is usually someone there…. maybe he's a prison guard.[131]

On 20 February 2006 on the death of his parent(s) the family inheritance was divided. Hakamada Iwao needed a representative to guard his interest (a guardian had been sought in the family court). The court decided it must appoint a psychiatrist first and for the first time his mental health was evaluated. Professor Okada Yukihisa found that he was suffering "institutional psychosis", that he could not deal with family matters, and that he needed a guardian.[132] The Tokyo Family Court rejected the appeal for a guardian in spite of Professor Okada's findings. The Tokyo High Court overturned the original decision and returned the case back to the lower court, which finally decided to appoint Hakamada Hideko to act in her brother's interests.

In a separate initiative relating to Hakamada Hideko's petition for a retrial for her brother, he was examined in 2008 by Dr Nakajima Naoshi (whose conclusion reflected some of the findings of Professor Okada Yukihisa).

In 2008, Amnesty International issued a public appeal on Hakamada Iwao.[133] It drew

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128 Interview with Nishijima Katsuhiko, February 2009.

129 Interview with Hakamada Hideko, 4 February 2009.

130 Interview with Hakamada Hideko, 4 February 2009.

131 Interview, 4 February 2009.

132 Prof Okada Yukihisa. Report in the case of Hakamada Iwao, Family Court, Tokyo, Case 80326, 7 November 2007.

133 Amnesty International. Hakamada Iwao, Japan. Index: ASA 22/007/2008, 2008. Available at: http://www.amnesty.org/en/library/asset/ASA22/007/2008/en/7a396cce-9c60-11dd-b0c5-35f205e84de0/asa220072008en.pdf. It also noted concerns about his possible innocence, including a statement by one of the judges who had convicted him in 1968 that he believed Hakamada not to be guilty of the crime for which he was convicted (see following note).

attention to the length of time he had spent in isolation in prison, to his fragile state of mental health and to the dispute about his possible innocence.[134]

Amnesty International sought a meeting with Hakamada Iwao in April 2009 but the Ministry of Justice refused.

MATSUMOTO KENJI

Matsumoto Kenji (b. 3 February 1951) was convicted on 17 September 1993 of a double murder and robbery carried out in the period September 1990 to September 1991. In this case he was charged along with his brother; after his brother committed suicide, the case against Matsumoto Kenji continued. He appealed but his case was rejected by the Osaka High Court on 21 February 1996. A subsequent appeal to the Supreme Court was rejected, and his death sentence was confirmed on 4 April 2000. Since that time he has been liable to execution at any moment.

Currently, he is believed to be using a wheelchair in Osaka Detention House. Matsumoto Kenji is suffering mental disability due to mercury poisoning (Minamata disease) and his lawyers have argued that he is not competent at the procedural level. He is seeking a retrial. In October 2008 a supporter received a letter in which he stated that he was being searched by radar and microwave; was suffering bruising as a result; and had received prize money from the Japanese Prime Minister, the US President and a famous US film actress. Amnesty International was told that this repetitive and incoherent letter reflected his day-to-day thinking. Fellow prisoners have expressed to lawyers their concern about his well being.

MATSUMOTO MISAO

Matsumoto Misao (b. 20 February 1965, and not related to the above prisoner) was convicted on 24 August 1993 of two murders and an injury resulting in death, and a robbery, perpetrated in December 1990 and July 1991. He had had mental health problems prior to his arrest and had a history of solvent abuse.[135] He appealed to the Tokyo High Court September 1994 but his appeal was rejected. He then appealed to the Supreme Court in 1998 but his death sentence was confirmed on 1 December of that year.

A co-defendant in the case had testified that Matsumoto was not involved in the killing and Matsumoto is appealing for a re-trial. Currently he says he is being affected by microwave radiation, has purple blood and similar delusional thoughts. He complains of headache which

134 One of the three judges who sentenced Hakamada at the first trial has maintained that he believed at the time, and still believes, that Hakamada Iwao is not guilty of the charge on which he was convicted. However, he was outvoted by the other two judges, and the conviction and sentence was imposed by majority verdict. Speaking at an Amnesty International event at the United Nations in 2008 he said: ""I was one of three judges deciding the case of Iwao Hakamada in 1968, a man who was arrested because there were rumours about his character and his behaviour. Objectively the evidence for him committing this crime was almost none; however, the investigator thought from the beginning that he was guilty, so the police conducted the investigation assuming that he was responsible for the crime. He was detained and coerced into making a confession because the police had arrested him." Testimonies from Judges and Prosecutors on the Death Penalty, Amnesty International Panel Discussion, United Nations, 21 October 2008.

135 Paint thinner is an organic solvent and one of a number of solvents used in Japan to achieve intoxication. Continued use can cause psychological problems. Kobayashi T, Fukui K, Hayakawa S, Koga E, Ono I, Fukui Y, et al. Psychological problem due to long-term organic solvent abuse [Article in Japanese], *Arukoru Kenkyuto Yakubutsu Ison.* 1995; 30(5):358-66. Abstract available at: http://www.ncbi.nlm.nih.gov/pubmed/8534223.

is being investigated with CT scan. These scans have been said to show that he has no underlying problem but lawyers cannot get access to the results. His legal team is applying for a re-trial but say that the prisoner's mental state is affecting his ability to participate in his defence. He is liable to be executed at any time even though he is seeking a retrial.

HORIE MORIO

Horie Morio was found? to have stabbed a married couple to death in 1986. He knew the husband -- who was a manager of a local enterprise -- and had previously tried, without success, to obtain work with this company. At some point, according to the charge sheet against him, he decided to kill them, and after his first attempt failed, applied a "fortune telling" approach. He was born in the year of the tiger and the company manager was born in the year of the chicken. According to tradition, 20 February is the day the tiger eats the chicken; on 20 February 1986, according to the charge sheet, Horie stabbed the manager and his wife to death.

According to his lawyer, Horie Morio accepts that he killed someone but said that they were not really dead.[136] At the Sendai High Court hearing on 29 March 1991 he said he killed a man but that the man was still living. Horie claims he killed a "cyborg" [an artificial human being], according to his lawyer. Court documents also mention him referring to the victims as "dolls"; in some interviews he acknowledges that he killed people. After Horie withdrew his appeal against his death sentence, the Supreme Court ruled on 31 May 1993 that "taking the prosecutor's and the defence lawyer's opinions into consideration and based on the Code of Criminal Procedure, articles 414, 404 and the main text of clause 1 of article 314, the judges reached a unanimous decision [to suspend the sentence]".[137] On 21 June 1993, Horie was sent to the Hachioji Medical Prison in Tokyo.[138] This was the first case in Japan of the suspension of a death penalty process due to a finding of incompetence in the appellant. Five years later the same court found that "the defendant is no longer in a state of insanity" and reversed their earlier finding.[139] The medical reports for both hearings were prepared by Prof. Fukushima Akira.

A third medical report confirmed to the court that Horie's mental state was such as to render him competent for execution and on 5 December 2004 his death sentence was upheld. Since then, Horie has not received any visitors.[140] Another death row prisoner has reported to his lawyer that he has heard the sound of Horie Morio kicking and making a noise in his cell, following which he was taken to the discipline cell.

Horie Morio has had a number of intelligence quotient (IQ) tests during his imprisonment with results ranging from a low of 54 to a high of 76 -- on either side of the value commonly used as one of the indicators of intellectual impairment.[141] This evidence of this possible

136 Interview with Funaki Tomohiko, Sendai, 6 February 2009.

137 Judgement of the Second Petty Bench of the Supreme Court (Chief Justice Onishi presiding) in Case No. 519(a), 1991.

138 Interview with Funaki Tomohiko, 6 February 2009.

139 Judgement delivered, 17 March 1998.

140 Interview with Funaki Tomohiko, 6 February 2009.

141 The most detailed examination of mental retardation in the context of the death penalty took place in the USA in submissions to, and consideration by, the Supreme Court in the case of *Atkins v Virginia* (2002). While the court did not set a precise standard for states to assess alleged mental retardation as a barrier to execution, it did refer to three key components of mental retardation: "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction

disability has not given rise to an appeal for a ruling of incompetence or disqualification from the death penalty on the grounds of mental retardation as called for in the ECOSOC resolution of 1989.[142]

However, while anecdotal and narrative accounts of prisoners' manners and behaviours can be compelling, they cannot replace a medico-legal review of a prisoner's state of health, particularly where this is carried out by a mental health specialist independent of the prison or prosecutorial system. Unfortunately such independent scrutiny is very difficult to exercise in Japan, as the case of Muramatsu Sei-ichiro illustrates.

MURAMATSU SEI-ICHIRO

Muramatsu was sentenced to death by the court of first instance on 22 September 1985. His sentence was confirmed by the Supreme Court on 8 October 1998. He applied to the Japan Federation of Bar Associations on 27 February 2001 for support in his case. He claimed that the Tokyo Detention Centre was operating "an illegal, new technology polygraph test on me" [143] and that they had "implanted some micro communication device in me to test artificial telepathy and remote pain transmission".

> "The government officials or the authorities are torturing me to make me give up the copyrights and the trademark of the 'Heavenly Calendar', which destabilises the nation and the national religion [Shinto], because they are convinced that they cannot take full control of the copyrights otherwise."[144]

While the JFBA committee found the application to be "full of nonsense" they felt compelled to investigate because the prisoner was on death row. The committee consulted an independent psychiatrist, Dr Nakajima Naoshi, who recommended that Muramatsu should be interviewed by a psychiatrist.

However, there is a marked resistance by the prison authorities to any measure that they claim may upset the prisoner. The JFBA wrote to the Director at the Tokyo Detention House on 30 October 2002 asking whether he would approve a lawyer's visit to the petitioner accompanying a psychiatrist as a part of the JFBA investigation of the case. A week later, the Tokyo Detention House replied verbally to the request, saying that they were reluctant to let the psychiatrist be present as direct contact with, and medical decisions from, the psychiatrist would seriously affect the handling of the inmate.[145] On 11 November 2002, the Tokyo Detention House sent a written confirmation of this response: "We understand that you are planning to have a psychiatrist accompany the lawyer to visit the said inmate in order to

that became manifest before age 18." *Atkins v Virginia* 122 S. Ct. 2242 (2002) section IV. The court noted at footnote 5 of their judgement: "It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function [component] of the mental retardation definition. 2 B. Sadock & V. Sadock, *Comprehensive Textbook of Psychiatry* 2952 (7th ed. 2000)." The judgement is available online at: http://www.findlaw.com/casecode/supreme.html

142 UN Economic and Social Council (ECOSOC), "Implentation of safeguards guaranteeing protection of the rights of those facing the death penalty", Resolution 1989/64, 24 May 1989. Mental retardation is a barrier to execution in the USA where, since the judgement of the US Supreme Court in *Atkins v Virginia*, the execution of intellectually disabled offenders has been prohibited on the grounds that it constitutes cruel and unusual punishment.

143 JFBA Human Rights Protection Committee. Report on petition of Mr Seiichiro Muramatsu, 10 January 2004, p.1.

144 Ibid.

145 Ibid.

ask various questions from the medical perspective. However, taking the inmate's legal status into consideration, we are concerned that such conduct will give unfavourable effect to the inmate's mind and may cause issues later. Therefore, we regret that we must ask you to refrain from bringing in the psychiatrist."

As a result of this refusal, Dr Nakajima went ahead and reviewed the available information without an interview. In the summary of his report, sent to the JFBA on 5 February 2003, Dr Nakajima concluded that "all of the symptoms [summarized in the report] point towards schizophrenia and prison reactions" and that "what he suffers from is serious".[146]

Before finalising their report, the JFBA committee contacted the Detention House again to determine the health care given to Muramatsu. On 15 May 2003 it responded, noting (in the words of the JFBA summary) that "the petitioner had either flatly refused or ignored the Centre's recommendations to see a doctor 13 times [in the previous 30 months] and also refused blood tests, blood pressure checks and medication". They noted that "he had been in a protected cell 4 times, for 13 days in total because of banging against his cell door, destruction of property, overexcitement and shouting". Dr Nakajima concluded that there was nothing further to be added to his previous report.

The JFBA concluded that the committee recommend to the Minister of Justice that Muramatsu Sei-ichiro shows "various symptoms (paranoia, auditory hallucinations, megalomania and incoherent thinking) of schizophrenia or prison psychosis. It is acknowledged that the petitioner suffers from severe mental illness, therefore, the execution order for the petitioner should not be signed."[147]

Muramatsu Sei-ichiro remains on death row at risk of execution. He has regarded his lawyer (Yasuda Yoshihiro) as the "enemy" since the Second Instance trial which happened on 29 June 1992. Muramatsu Sei-ichiro dismissed Yasuda Yoshihiro, who continues working on behalf of Muramatsu's brother.[148]

MEDICO-LEGAL REPORTS

Notwithstanding the barriers placed in the way of independent medico-legal assessments, some interviews are undertaken by mental health specialists -- usually much shorter than would be the case in other jurisdictions.[149] Records made available to lawyers in connection with legal proceedings were made available to Amnesty International.

Amnesty International was not able to interview any health professional currently working within a prison setting. However it was able to speak to lawyers and a former prison physician for background information and delegates obtained some medical reports that emerged in the context of legal proceedings in two of the cases mentioned above.

HAKAMADA IWAO

Although Hakamada Iwao has shown signs of mental illness for nearly 30 years,[150] his first

146 Ibid para 4f.
147 Ibid. p.6.
148 Interview with Yasuda Yoshihiro, February 2009.
149 One or two hours in Japan; it would frequently be longer elsewhere such as the in the USA.
150 Hakamada Hideko, the prisoner's sister, told AI delegates that she first noticed changes in his

mental health assessment for court purposes was not related to his competence within the framework of his criminal case. Rather he was examined in connection with a case before the Family Court seeking to establish his competence to be party to an inheritance settlement following the death of his mother. Hakamada Iwao was examined by Professor Okada Kouhisa during one hour interviews on 23 and 25 October 2007; Professor Okada reported on 7 November 2007. An independent examination of one hour's duration was conducted by Dr Nakajima Naoshi on 16 January 2007 in connection with his death penalty case and he finalized his report on 11 August 2008.

PROFESSOR OKADA'S REPORT

Professor Okada Yukihisa of the National Institute of Mental Health: National Center of Neurology and Psychiatry evaluated Hakamada's mental state in relation to specific capabilities. These were his communication ability, his memory, his sense of time and date, his capacity for basic calculation, his comprehension, intelligence, and his manner.

Professor Okada concluded that "at present he cannot be diagnosed as having any other mental condition other than a tendency of delusion. The conversation proceeded without any problem unless it touched certain topics that are related to himself. He would say hello and goodbye, keep his eyes fixed on the judge, mention that he cannot hear the judge's voice[151] and end the conversation when being told that it is the end of the interview. Therefore he does not lack communication skills." In trying to assess Hakamada's financial skills (one of the elements linked to the question of his need for a guardian) Professor Okada noted: "He stated that he has all the countable amount of money in the world. He said, 'I have gained 5 trillion yen today' and it was impossible to have a rational conversation with him."

On the question of Hakamada's capacity to recover from his current mental state Dr Okada wrote: "From the interview and testing, he is not considered to suffer from irreversible mental disability (such as dementia). In actual fact, the only mental disability that could be observed from him is a tendency of having delusional thoughts. This mental disability was due to the long term stay in the detention centre."

Dr Okada's diagnosis was that Hakamada suffered from "mental disability, mainly due to the long term stay in the detention center; [that] At present, due to the above mental condition, he is not able to manage his finance; [and that] if he is to be released from the center, there is a high possibility that he would recover his capability." In other words it is the imprisonment itself that is causing his mental disability.

DR NAKAJIMA'S STUDY

On 27 August 2007, Nishijima Katsuhiko, the defence lawyer seeking the retrial of Hakamada Iwao, asked the Ethical Issues Committee of the Japanese Society of Psychiatry and Neurology to give an opinion on matters relating to Hakamada's mental health in the context of his appeal for a retrial. The questions focused on three issues:

- Hakamada's current physical and mental status
- Whether Hakamada satisfies the requirement of competency to stand trial

thinking and behaviour within months of the finalisation of his death sentence in 1980. (Interview February 2009). His lawyer marked the appearance of significant mental unbalance in the mid-1980s (Interview February 2009).

151 A judge is involved in the interviews and assessment of competence.

- Whether Hakamada is in a 'state of insanity', as specified in Article 479 of the Code of Criminal Procedure.

Dr Nakajima was delegated the task of reporting on the case for the Committee. His study was limited by what could be managed in a one-hour interview with Hakamada on 16 January 2008. He was accompanied during the interview by Nishijima Katsuhiko and Ozawa Yuichi, also a lawyer. Dr Nakajima also interviewed Hakamada Iwao's sister, Hideko, both in person and by telephone in 2008.

Dr Nakajima also reviewed more than 60 legal documents relating to the case and extensive correspondence of Hakamada Iwao. Dr Nakajima acknowledged that "As physical contacts and any other examinations were not permitted, the information I could obtain was extremely limited" but noted that he saw no obvious physical defect apart from a tendency to trail his left foot when walking.

After noting Hakamada's polite manner and rapid conversation, Dr Nakajima records over several pages the conversation between them.[152] It is generally incoherent and disconnected. At one point Hakamada was asked if he understood what an execution is. He replied: "The wisdom never dies. On that kind of wisdom, this is wisdom. It never dies. There are lots of ladies in the world, lots of animals. Everyone is living and feeling something. Elephants, dragons. No way will I die." When it was put to him that he would die if executed he replied, "I won't die. There's no one who will die. Somewhere around God you can live."

When asked if he had anything to say to the judge [in his case] he replied, "Myself is the object, I am the police commissioner. If we make the judge an issue, it is the issue of outside world. It is not possible because of the ceremony's side." He added: "The judge is written at Gakushuin. There's no evidence. There is no evidence that the state is touching him. The machine has written it. There is no fact in it."

In his discussion of the interview and his impressions, Dr Nakajima addresses the three questions posed by the JSPN Committee. He starts by trying to come to a diagnosis of Hakamada's mental state and speculates that "prison reaction" could account for his thought processes and language. According to Dr Nakajima, "Prison reaction is a psychiatric disorder that develops triggered by detention; the symptoms are hallucination, delusion, agitation, stupor and approximate answer..." Dr Nakajima notes that this diagnosis is not found in the diagnostic schema of the World Health Organization or the American Psychiatric Association[153] but that elements of it are. He rules out malingering or "factitious disorder" (respectively Z76.5 and F68.1 in the ICD-10).

On the question of the relevance of Article 479 of the Code of Criminal Procedure, Dr Nakajima notes the absence of criteria for determining competence for execution in Japanese law but refers to discussion in US jurisprudence and forensic psychiatry. He notes in particular the ethical dilemma of restoring competence and thus permitting execution.

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152 Dr Nakajima noted that there may be inaccuracies in his record of the conversation due to Hakamada's rapid conversation and the fact that he was not permitted to use a recording device. The translations of the conversation into English is also challenging because of Hakamada's disordered language.

153 These are, respectively, World Health Organization. *International Classification of Diseases* (ICD-10), 2007. Online version: http://www.who.int/classifications/apps/icd/icd10online/; and American Psychiatric Association (2000). *Diagnostic and Statistical Manual*, Fourth Edition, Text Revision (DSM-IV-TR); http://www.dsmivtr.org/.

Dr Nakajima concludes that Hakamada Iwao is suffering from a prison reaction with megalomania and thought disorder; he requires treatment in a hospital although a medical prison might be suitable; he currently is not competent to petition for retrial and his condition constitutes a "state of insanity" within the terms of article 439 (1-4) of the Code of Criminal Procedure.[154] Dr Nakajima finally concluded that Hakamada lacks capacity to understand his situation, to assist in preparation and conduct of his own case and thus would seem to lack competence for execution.[155]

The duty of care of the state with regards to detainees includes the obligation to provide adequate medical care, including mental medical care.[156] Failure to protect a prisoner's mental health can breach human rights legislation. For example, in the European Court of Human Rights, the court held unanimously in the case of *Rivière v France* that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights, as the conditions of the applicant's detention were not appropriate for a person with a mental disorder. The court considered that "the applicant's continued detention without medical supervision appropriate to his current condition entailed particularly acute hardship and caused him distress or adversity" and upheld his appeal against the French government.

Hakamada's legal team continues to press his claim for a retrial. When asked what she hoped as an outcome for her brother, Hakamada Hideko told Amnesty International that "in Japan the only way to save him is to have the request for retrial granted. If the request for retrial is granted then he will be acquitted and then he will be released -- but it is extremely difficult to have the request for retrial granted".

In April 2009, Amnesty International learned that when he had visitors, Hakamada Iwao was brought to the visiting room in a wheelchair. No information is available as to the reason for his infirmity.

HORIE MORIO

Horie Morio was examined by request of the court when he withdrew his appeal on 27 March 1992. The examination was carried out on 29 June 1992 by Prof Fukushima Akira who submitted his report on 10 February 1993 to the Second Petty Bench of the Supreme Court. In his report, Prof Fukushima discussed the risk factors for prison psychosis exhibited by the prisoner.

> "Regarding the defendant, he is a first offender and also committed a felony. His intelligence is low as it is borderline. He has a predisposition to epilepsy and has been treated as an unconvicted prisoner who had been sentenced to capital punishment from the first judgement. He has also been locked in solitary confinement, protected custody, or disciplinary custody for most of his seven year detention period. Except for the fact that he is not so young, he has almost all the factors which can easily induce serious prison psychosis. Therefore it would not be surprising if he has prison psychosis."[157]

154 Article 439 (1)(4) permits a sibling to make an appeal in the case of a prisoner who is "in a condition of mental derangement".

155 Report by Dr Nakajima Naoshi, p. 47.

156 See, for example, UN Standard Minimum Rules for the Treatment of Prisoners, article 22.

157 Report on the psychiatric evaluation of Morio Horie, by Professor Fukushima Akira, 10 February 1993, p.85.

Horie Morio could be diagnosed as "epileptic due to many symptoms of mental disorder that have been seen in his clinical tests. His statement of his experience has not been always coherent, and is clearly associated with epileptic abnormal electrical activity in his brain." Moreover "his IQ is not too low to understand what the death sentence is, although it is possible that his low intelligence has got something to do with the fact that he was under the impression that he would only be sentenced to, at most, five or six years of imprisonment for murder. Neither is it too low for him to be aware that he would be sentenced to death if he cancelled his appeal ..."[158]

On 30 May 1993, on the basis of the findings of this evaluation, the Supreme Court decided to suspend the trial procedure. On 17 June 1993, the prisoner was transferred by court order from Tokyo Detention House to Hachioji Medical Prison.

On 12 June 1997, Judge Katsuya Onishi, the Chief Justice of the Second Petty Bench of the Supreme Court, ordered another evaluation of the mental state of Horie Morio. The assessment was again carried out by Prof Fukushima Akira.[159] At the time of the evaluation, Horie was receiving medication as follows: Carbamazepin, 400mg (antiepileptic agent), Bromperidol, 15mg, and Haloperidol, 8mg (antipsychotic agents), Diazepam, 8mg (anxiolytic), and Promethazine, 80mg (to control side-effects).

According to Prof Fukushima's report, in the period immediately after his transfer to Hachioji, Horie had "severe symptoms of mental illness such as auditory hallucination, excitation and restlessness, and rule violations such as roaring and banging on the doors were often seen". Subsequently, however, his condition improved: manifestations of mental disturbance were less severe and psychotic episodes were becoming rare. His condition has waxed and waned, and "the rule violations based on the auditory hallucination (telepathy) have not been seen since 1996".[160]

The extensive transcripts of interviews contained in the report appear to show a man aware both of his previous mental state – acknowledging the influence of "telepathy" [hallucinations/delusion] which he no longer experiences, for example – but also showing confusion and contradiction in his verbal and written expression.

In the battery of psychometric tests applied to Horie, those yielding an IQ value suggested that he fell into the borderline mental retardation zone. Since he also scored poorly on tests measuring adaptability and capacity to manage his life, he would seem to be the kind of prisoner covered by evolving jurisprudence in the USA prohibiting execution of people with mental retardation.[161]

Prof Fukushima concluded his 38-page report summarizing that Horie had a poor level of intelligence, and was impulsive and emotionally unstable. His perception had improved relative to his previous psychological test. He still had delusional thoughts even though he had made progress through therapy. The report concluded that Horie cannot be diagnosed as suffering schizophrenia or any other major mental disorder. As a result of the report, the Supreme Court issued a reversal of the previous suspension of the death penalty procedure

158 Ibid., p.72.
159 Report of psychiatric evaluation of Morio Horie by Professor Fukushima Akira, 1997.
160 Ibid. p.2.
161 See US Supreme Court. *Atkins v. Virginia* (00-8452) 536 U.S. 304 (2002) prohibiting the execution of the mentally retarded as contrary to the US constitutional prohibition against "cruel and unusual punishment".

and Horie Morio was returned to Sendai Detention Centre.

A third examination of Horie was carried out in 2003 by Professor Nishiyama Sen. His report reviewed the history of mental health evaluations of the prisoner by Professor Hosaki in 1987; Professor Oda in 1989; and Professor Fukushima in 1992 and 1997. With respect to IQ he noted scores greater than 70 in the examinations of Professor Hosaki and Professor Oda and less than 70 in the second report of Prof Fukushima and his own report – "always on the borderline between normal and mental retardation" as Prof Nishiyama states (p.64).[162]

Regarding his findings, Prof Nishiyama concluded:

"1. The defendant is in a state of detention reaction at present and, with respect to symptomatology, he shows *pseudologia fantastica*.[163] Symptoms that seem to be of mental illness, such as telepathy (auditory hallucination), delusion of innocence, the other pathological experiences and incoherent thinking come from the defendant's desire and have a purpose to fulfil the desire, which is easily comprehended from the situation the defendant has been put in.

2. The above mentioned symptoms mostly depend on trial situations and words and behaviours of people who come in contact with the defendant. It seems that the defendant can contribute to legal action if conversation with him is continued patiently without encouraging his fantastic tendency."

Lawyers remain concerned at Horie Morio's state of mind and the possibility that he could be executed at any time.

162 Report of Prof Fukushima, 1997, p.64.

163 *Pseudologica fantastica* is the pathological telling of falsehoods or lying. A number of psychiatric disorders include lying or other deception as a symptom. These include: Malingering, Confabulation, Ganser's Syndrome, Factitious Disorder, Borderline Personality Disorder, and Antisocial Personality Disorder. CC Dike, M Baranokki, EEH Griffith (2005). "Pathological Lying Revisited." *Journal of the American Academy of Psychiatry and Law* 33:342–9. Available at: http://www.jaapl.org/cgi/reprint/33/3/342

5/MEDICAL ETHICS AND THE DEATH PENALTY

The ultimate fate of the condemned prisoner represents a major pressure on the ethics of medical professionals. Providing medical care to prisoners in Japanese places of detention takes place in the absence of a capacity by the prisoner to make choices and in an environment in which informed consent cannot always be assured. The prison confirms on a daily basis prisoners' lack of agency.

Linked with the situation of the prisoner is the doctor's inability to resolve many of the prisoner's underlying existential problems and related medical problems. Prisoners are held in conditions, such as prolonged solitary confinement, that is highly likely to generate stress and illness. Thirdly, doctors lack true clinical independence since some clinical recommendations available to doctors in civil society are not available to the prison doctor since problems arising from prolonged isolation cannot be remedied by, for example, treatment requiring more social interaction. Moreover they face acute dilemmas arising from dual loyalty obligations[164]: doctors are required to conform to the requirements of their employer, the prison director and the Department of Corrections, and at the same time to provide care to the prisoner on the basis of need and with due regard to principles of medical ethics. These obligations are frequently not compatible, particularly where prison rules that doctors cannot challenge give rise to harm to the prisoner.

Another clash between ethics and psychiatric practice arises in the context of forensic evaluations bearing on competence. Since a finding of competence (or an evaluation that might assist a judge to determine competence) could hasten the death of a prisoner, it raises important questions of ethics. A key element in arriving at an ethical position is an understanding of who makes the assessment of competence. The World Psychiatric Association has called on psychiatrists not to make evaluations of competence to be executed[165] though some psychiatrists do provide mental health evaluations in the belief that they contribute to the judicial process and can lead to the reversal of the death sentence of an incompetent prisoner. Both sides in this argument can agree that it is not the role of the psychiatrist to deliver a competence assessment although one commentator drew attention to a possible negative consequence of professional abstinence from medico-legal assessments – that incompetent prisoners might nevertheless be executed if psychiatrists did not provide the professional evaluations that could contribute to findings of incompetence.[166] However, competence to be executed is not a medical concept. The state that wishes to kill the prisoner must ensure that this evaluation is made within the criminal justice system and in a manner consistent with medical ethics.

A related issue that has arisen relatively commonly in the USA and in a small number of cases in Japan is the ethics of treating incompetent prisoners in order that they will be fit for execution. A mentally ill prisoner who meets the requirements of Japanese legislation

164 International Dual Loyalty Working Group (2002). *Dual Loyalty & Human Rights in Health Professional Practice; Proposed Guidelines & Institutional Mechanisms*. Boston: Physicians for Human Rights. Boston: Physicians for Human Rights. Available at: http://physiciansforhumanrights.org/library/documents/reports/report-2002-duelloyalty.pdf.

165 See appendix below, p.74.

166 M. Yokofujita. "Legislative arguments on execution of mentally ill--special reference to the Constitution of the USA." *Seishin Shinkeigaku Zasshi*;107(7):681-7, 2005.

exempting an "insane" prisoner from execution, may be rendered fit for execution by medical treatment. The case of Horie Morio would appear to be such a case (see above, pp.45-47) though not in the manner discussed in the US courts and literature (which have focused on administration of anti-psychotic medication to quickly reverse incompetence).[167] Horie Morio was ruled incompetent in 1993 and then, after five years' treatment in Haichioji medical prison, was evaluated as fit for execution.

The suggestion made more than 20 years ago by Radelet and Barnard[168] was to commute the death sentence of a condemned prisoner prior to treatment. This unambiguously clarified the rationale for treating the prisoner to exclude re-establishing fitness for execution and to focus on the goal of restoring the prisoner's mental health as an objective of medical care in itself. This position was subsequently adopted by the American Medical Association[169] and further recommended by the American Bar Association.[170] It has also been recommended by the Japanese Society of Psychiatry and Neurology.[171]

PROFESSIONAL CODES OF ETHICS

The brief code of medical ethics of the Japan Medical Association (JMA) would appear to oppose the involvement of doctors in executions. "The mission of medical science and health care is to cure diseases, to maintain and promote the health of the people; and based on an awareness of the importance of this mission, the physician should serve society with a basic love of humanity."[172] Otherwise there is no specific statement by the JMA on doctors and the death penalty. However in an interview with Amnesty International, the JMA affirmed their support for the World Medical Association proscription of medical participation in executions. They did not agree that prison medical staff faced particular ethical dilemmas. They expressed a lack of confidence that transferring responsibility for prison health care from the Ministry of Justice to the Ministry of Health, Labour and Welfare would be effective unless funding was guaranteed within the Health Ministry.[173]

The national medical body with the most detailed consideration of ethics and the death penalty is the American Medical Association (AMA).[174] The AMA, while acknowledging that it is a physician's right to choose to support or oppose the death penalty in their personal

167 See, for example, discussion of *Singleton v Norris* in SF DePanfilis, "Singleton v. Norris: Exploring the Insanity of Forcibly Medicating, then Eliminating the Insane" (September 1, 2004). *University of Connecticut School of Law. Connecticut Public Interest Law Journal.* Paper 38. http://lsr.nellco.org/uconn/cpilj/papers/38.

168 M. Radelet, G. Barnard. "Treating those found incompetent for execution: ethical chaos with only one solution." *Bulletin of the American Academy of Psychiatry and Law* 16(4):297-308, 1988.

169 The AMA commentary on ethics and the death penalty states that "When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins..."

170 "There is only one sensible policy here: a death sentence should be automatically commuted to a lesser punishment (the precise nature of which will be governed by the jurisdiction's death penalty jurisprudence) after a prisoner has been found incompetent for execution." American Bar Association. "Recommendation and Report on the Death Penalty and Persons with Mental Disabilities." *Mental and Physical Disability Law Report* 30 (5): 668-677, 2006.

171 N Nakajima. The Society's Declaration concerning participation of psychiatrists in capital punishment. *Seishinkeishi* 107(7):676-680, 2005.

172 Japan Medical Association. Preamble to Principles of Medical Ethics. (Undated.) Available at: http://www.med.or.jp/english/02_princ.html

173 Interview with JMA officers, Tokyo, 22 April 2009..

174 American Medical Association. Code of medical ethics. Opinion 2.06 Capital punishment. Available at: http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/opinion/opinion206.html.

capacity, has held that participation in the death penalty is unethical and set out the acts that it believes are unethical:

- prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure;
- monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician;
- and rendering of technical advice regarding execution.

The AMA position continues:

> "Physicians should not determine legal competence to be executed. A physician's medical opinion should be merely one aspect of the information taken into account by a legal decision maker such as a judge or hearing officer."

The AMA statement contains three important provisions bearing on the medical role with respect to a mentally ill prisoner.

The first is that "when a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins."

Secondly it states that "the task of re-evaluating the prisoner should be performed by an independent physician examiner. If the incompetent prisoner is undergoing extreme suffering as a result of psychosis or any other illness, medical intervention intended to mitigate the level of suffering is ethically permissible."

Thirdly, the AMA states that "No physician should be compelled to participate in the process of establishing a prisoner's competence or be involved with treatment of an incompetent, condemned prisoner if such activity is contrary to the physician's personal beliefs. Under those circumstances, physicians should be permitted to transfer care of the prisoner to another physician."[175]

While the AMA opposes medical participation in the death penalty, other US associations have called for a moratorium on executions[176] or have urged an end to the use of the death penalty.[177]

The global position reflects some of the same values. The World Medical Association has requested "firmly" its constituent members to "advise all physicians that any participation in capital punishment" is unethical and has urged members to "lobby actively national governments and legislators against any participation of physicians in capital punishment".[178]

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175 American Medical Association. Code of medical ethics. Opinion 2.06 Capital punishment. Available at: http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/opinion/opinion206.html

176 American Psychiatric Association (2000). *Moratorium on Capital Punishment in the United States*, Position Statement of the American Psychiatric Association. APA Document Reference No. 200006. Washington, DC

177 American College of Physicians, American Public Health Association.

178 World Medical Association. WMA Resolution on Physician Participation in Capital Punishment (adopted 1981, most recently revised 2008). Available at: http://www.wma.net/e/policy/c1.htm .

The World Psychiatric Association declared in 1998 that "the participation of psychiatrists in [the death penalty] is a violation of professional ethics"[179] and later called for psychiatrists "under no circumstances" to participate in "legally authorized executions nor ... assessments of competency to be executed."[180] The International Council of Nurses has urged all member states to work for the abolition of the death penalty.[181]

THE POSITION OF THE MEDICAL PROFESSION IN JAPAN[182]

JAPAN MEDICAL ASSOCIATION (JMA)
The JMA is the national medical association that represents both private and public sector doctors in Japan. It is a member of the World Medical Association (WMA). The JMA co-exists with many local medical associations and is responsible for international relations, policy and medical ethics. It supports the WMA position on the death penalty but appears not to identify major ethical problems within prisons or to have discussed the subject of the death penalty within the association.[183]

JAPANESE SOCIETY OF PSYCHIATRY AND NEUROLOGY
The JSPN, a member of the World Psychiatric Association, has addressed the death penalty both in policy terms and as a social issue. See discussion below.

JAPANESE NURSING ASSOCIATION
The JNA is a member association of the International Council of Nurses. The JNA has not discussed the death penalty and has no institutional policy on it, though says that it advocates equal health care for all, including prisoners.[184]

The Japan Society of Psychiatry and Neurology (JSPN) adopted a temporary position in 2002 against participation by psychiatrists in the death penalty[185] and subsequently adopted a definitive position.[186] A paper presented to the 100th JSPN Symposium in 2005 discussed some of the key elements of the position of the Society:

- A call for abolition of the secrecy currently characterising the death penalty in Japan
- Psychiatrists in correctional practice should not participate in forensic assessments of the mental health of prisoners

The Japan Medical Association is a member association of the WMA.

179 World Psychiatric Association. Declaration on the Participation of Psychiatrists in the Death Penalty. Available at: http://www.wpanet.org/content/ethics-death-penalty.shtml. The Japanese Society of Psychiatry and Neurology is a member association of the WPA.

180 World Psychiatric Association. Declaration of Madrid, adopted 1996. Available at: http://www.wpanet.org/content/madrid-ethic-engish.shtml.

181 International Council of Nurses. The Japanese Nursing Association is a member association of the ICN.

182 Meetings were conducted with officers and staff of the three organizations in Tokyo between 20 and 24 April 2009.

183 Interview at JMA office, Tokyo, April 2009.

184 Interview at JNA office, Tokyo, April 2009.

185 The Temporary Declaration of the Japanese Society of Psychiatry and Neurology Concerning Participation of the Psychiatrists in Execution (16 March 2002). *Seishinkeishi*;104 (7): 641-642, 2002; Cited by Nakajima N. The Society's declaration concerning participation of psychiatrists in capital punishment. *Seishinkeishi* 107(7):676-680, 2005.

186 Declaration of the Japanese Society of Psychiatry and Neurology Concerning Participation of Psychiatrists in Execution (24 December 2004). *Seishinkeishi* 2005;107 (7): 776-777.

- Assessment of competence for executions should not be carried out even by independent psychiatrists
- Psychiatrists should not treat death row inmates to restore them to competence
- The possibility of miscarriages of justice has to be acknowledged
- Where psychiatrists are forced to undertake competence evaluations, any suggestion of incompetence should lead to an automatic commutation of the death sentence.[187]

To date, the death penalty remains a lawful but a restricted penalty under international law, although it is regarded by the Human Rights Committee as a penalty that should eventually be abolished. Some national jurisdictions have taken a more immediately critical position.[188] The South African government incorporated abolition of the death penalty into the country's 1996 constitution. As this interpretation of the death penalty gains ground, it will become increasingly important for professional bodies to reflect this in their codes of ethics. Amnesty International believes that the best time to do this is now.

187 N. Nakajima. "The Society's Declaration Concerning Participation of Psychiatrists in Capital Punishment." *Seishinkeishi*, 107(7): 676-680, 2005.

188 For example, the South African Constitutional Court in the landmark judgement of *State v. Makwanyane and Mchunu* in June 1995 provided a "comprehensive review of the case law of international human rights monitoring bodies at that time and then arrived at the firm conclusion that capital punishment in any case must be regarded as cruel, inhuman and degrading punishment" Judgement of 6 June 1995, case No. CCT/3/94, cited in Special Rapporteur on Torture. A/HRC/10/44, para 45, available at: http://www.crin.org/docs/G0910312.pdf

6/INTERNATIONAL PERSPECTIVES ON THE DEATH PENALTY

Japan is resistant to calls for the reform of the death penalty. It voted against the first UN General Assembly resolution 62/149 calling for a "Moratorium on the use of the death penalty" in December 2007. Japan also joined a Note Verbale by a minority of states opposed to the adoption of this resolution.[189] A year later it confirmed its opposition by voting against the second resolution 63/168 in favour of a global moratorium adopted by the General Assembly in 2008 with 106 votes in favour, 46 against and 34 abstentions.[190]

VOICES FOR ABOLITION IN JAPAN

The Japanese Federation of Bar Associations (JFBA) represents all local Bar Associations in Japan. The JFBA has spoken out on individual cases and has urged the abolition of the death penalty. Web address: http://www.nichibenren.or.jp/en/

Human rights and prisoner support organizations. Amnesty International Japan (http://www.amnesty.jp), the Centre for Prisoners Rights, Forum 90, Ocean, Japan Death Penalty Information Centre (http://www.jdpic.org), Tokyo Center for Mental Health and Human Rights, maintain a human rights oversight of the death penalty and make submissions to government.

Diet group. An all-party group against the death penalty monitors and opposes the death penalty. Not all members of this group feel able to identify themselves publicly as members because of the perceived political cost of opposing the death penalty.

Religious communities. Some representatives of faith organizations in Japan have spoken out publicly against the death penalty in general or on particular cases. The National Council of Churches of Japan, the Anglican Church and the Tendaishu Buddhist sect have adopted positions in favour of abolition.[191]

Press: There is no obvious voice for abolition in the Japanese press. Coverage of the death penalty by Japanese press is usually restricted to reports of crime and court cases. The newspaper *Yomiuri Shimbun* carried four series of articles in 2008 and 2009 on the death penalty, substantially written from the point of view of the families of murder victims.

In the only other member of the G7 group of industrialized countries that uses the death penalty -- the USA -- lawyers for prisoners accused or convicted of a capital offence can seek a mental health evaluation of a prisoner to better inform their defence case. It is also possible for such a prisoner to have visitors who might include external medical experts. Moreover, academic medical professionals may be able to carry out surveys and analysis.[192]

189 Note Verbale addressed to the UN Secretary-General, A/62/658, of 11 January 2008

190 UN General Assembly resolution 62/149, 18 December 2007, calling for a worldwide moratorium on executions. The resolution was adopted by 104 UN member states in favour, 54 countries against and 29 abstentions. The follow up resolution was GA 63/168, 18 December 2008.

191 Yasuda Yoshihiro (2004). "The death penalty in Japan." In: Council of Europe. *The death penalty: Beyond Abolition*, Strasbourg, 2004, pp.215-231.

THE JAPANESE GOVERNMENT AND THE DEATH PENALTY

The death penalty retains high levels of support among the public, in the Diet, and among government ministers. However, such support is built on the secrecy of the death penalty, the lack of public discussion of the death penalty and alternative punishments, and a lack of critical voices in the media among other reasons.

In its report to the Human Rights Committee under Article 40 of the ICCPR, the Japanese government stated that "in the Japanese legal system, the death penalty is applied only to particularly serious crimes (murder or intentional acts involving serious risk of injury to human life)".[193] It drew attention to the fact that "the majority of the public believes the death penalty to be inevitable for extremely heinous and atrocious crimes ... and since such heinous crimes as murder and death on the occasion of robbery resulting in multiple deaths are still being committed, the Government's view is that imposing the death penalty on those who have committed extremely heinous crimes and whose criminal responsibility is extremely grave cannot be avoided, and that abolishing the death penalty is not appropriate."[194]

In response to the Committee, Japan took the view that it was not appropriate to introduce a general moratorium on the implementation of the death penalty against those so sentenced. The argument was not put in terms of a preference by Japan to continue using the death penalty but rather in terms of negative effects of a moratorium. The delegation said that a moratorium could result in an even more inhumane situation by suspending executions and then, following revocation, the condemned prisoners would have their hopes dashed and again be liable to be executed. Hence, it was not appropriate to take a general moratorium on the execution of death penalty for all those who received the sentence.[195]

In its written report the government also expressed concern that an alternative to the death penalty, such as life imprisonment without the possibility of parole, "is problematic in terms of criminal policy and [because] the personality of the inmate may be completely destroyed through the lifelong confinement."[196] There was no analysis of the extent to which the personalities of death row prisoners "may be completely destroyed" in those cases where they are held for 20, 30 or 40 or more years in harsh conditions awaiting their execution.

While government stated concern for the peace of mind of the prisoner and the minimisation

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192 See, for example, Lewis DO, Pincus JH, Feldman M, Jackson L, Bard B. Psychiatric, neurological, and psychoeducational characteristics of 15 death row inmates in the United States. *American Journal of Psychiatry* 143(7):838-45, 1986.

193 Human Rights Committee. Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant. Fifth periodic reports of States parties due in 2002, Japan. UN document CCPR/C/JPN/5, 25 April 2007, para. 128.

194 Human Rights Committee. Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant. Fifth periodic reports of States parties due in 2002, Japan. UN document CCPR/C/JPN/5, 25 April 2007, para. 130. Discussed by HRC, Geneva, on 15 and 16 October 2008. Available at: http://www2.ohchr.org/English/bodies/hrc/hrcs94.htm.

195 Human Rights Committee. Replies to the List of Issues (CCPR/C/JPN/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Japan. UN Document CCPR/C/JPN/Q/5/Add.1, 23 September 2008 Available at: http://www2.ohchr.org/English/bodies/hrc/hrcs94.htm

196 Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Fifth periodic reports of States parties due in 2002, JAPANCCPR/C/JPN/5, 25 April 2007, para 131, p.38. Available at http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm

of "mental anguish" of the prisoner's family are to be welcomed, the actual procedures adopted by the authorities are designed (whether intentionally or accidentally) to have the reverse effect. The stress arising from "structured uncertainty" -- from knowing that a highly prejudicial event will happen without being certain as to when it will happen -- is potent and enduring both for prisoners and their families.[197] The condemned person's mental state may influence his or her decision to withdraw an appeal and dismiss lawyers, effectively to "ask" for the death sentence to be applied. Such attitudes could well be pathological rather than a genuine sign of remorse. It seems incontestable that the acceptance of a condemned person's withdrawal of appeal provides a fast track to the execution of mentally ill persons. Indeed Takuma Mamoru, a man convicted of several murders but having a history of mental illness, was executed in September 2004, just one year after the death sentence was pronounced by the court of first instance, an exceptionally rapid process. More generally, it cannot be ruled out as a factor leading prisoners to drop their appeals to hasten the carrying out of the sentence.[198]

INTERNATIONAL SCRUTINY

Conditions in Japanese prisons and the use of the death penalty have been the subject of review and comment over many years.

UNITED NATIONS

Human Rights Committee. This committee, made up of independent experts (rather than national representatives), monitors states parties' implementation of the International Covenant on Civil and Political Rights (ICCPR). More than a decade ago the Human Rights Committee, in its concluding observations to Japan's Fourth Periodic Report under the ICCPR, stated that it: "remains seriously concerned at the conditions under which persons are held on death row. In particular, the Committee finds that the undue restrictions on visits and correspondence and the failure to notify the family and lawyers of the prisoners on death row of their execution are incompatible with the Covenant. The Committee recommends that the conditions of detention on death row be made humane in accordance with articles 7 and 10, paragraph 1, of the Covenant."[199]

Little has changed since these recommendations were made, a fact that when the Committee considered Japan's fifth periodic report in October 2008 prompted "a feeling of frustration among committee members that earlier comments had not been taken into account by Japan. The Committee understood that there were obstacles but hoped that through an ongoing dialogue progress could be achieved."[200]

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197 M. Radelet, M. Vandiver, F. M. Barado (1983). Families, prisons, and men with death sentences: the human impact of structured uncertainty. *Journal of Family Issues*, Vol. 4, No. 4, 593-612, 2003.

198 Because of the secrecy attending Japanese executions no independent research has established if this hypothesis is true in Japan. In the USA, research has demonstrated a high level of mental illness in prisoners withdrawing their appeals: more than 70% of the cases studied by Blume had a history of mental illness (J. Blume, "Killing the Willing: Volunteers, Suicide and Competency", *Michigan Law Review* 103: 939-1009, 2005.)

199 Concluding Observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/79/Add.102, 19 November 1998, para. 21..

200 UN Office, Geneva, http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/85D3C531C1EC5655C12574E400539DF0

The committee stated at para. 16:

> While noting that, in practice, the death penalty is only imposed for offences involving murder, the Committee reiterates its concern that the number of crimes punishable by the death penalty has still not been reduced and that the number of executions has steadily increased in recent years. It is also concerned that death row inmates are kept in solitary confinement, often for protracted periods, and are executed without prior notice before the day of execution and, in some cases, at an advanced age or despite the fact that they have mental disabilities. The non-use of the power of pardon, commutation or reprieve and the absence of transparency concerning procedures for seeking benefit for such relief is also a matter of concern (art. 6, 7 and 10).
>
> Regardless of opinion polls, the State party should favourably consider abolishing the death penalty and inform the public, as necessary, about the desirability of abolition. In the meantime, the death penalty should be strictly limited to the most serious crimes, in accordance with article 6, paragraph 2, of the Covenant. Consideration should be given by the State party to adopting a more humane approach with regard to the treatment of death row inmates and the execution of persons at an advanced age or with mental disabilities. The State party should also ensure that inmates on death row and their families are given reasonable advance notice of the scheduled date and time of the execution, with a view to reducing the psychological suffering caused by the lack of opportunity to prepare themselves for this event. The power of pardon, commutation and reprieve should be genuinely available to those sentenced to death.
>
> ...The Committee notes with concern that an increasing number of defendants are convicted and sentenced to death without exercising their right of appeal, that meetings of death row inmates with their lawyer in charge of requesting a retrial are attended and monitored by prison officials until the court has decided to open the retrial, and that requests for retrial or pardon do not have the effect of staying the execution of a death sentence (art. 6 and 14).
>
> The State party should introduce a mandatory system of review in capital cases and ensure the suspensive effect of requests for retrial or pardon in such cases. Limits may be placed on the number of requests for pardon in order to prevent abuse of the suspension. It should also ensure the strict confidentiality of all meetings between death row inmates and their lawyers concerning retrial."
>
> The Committee also expressed concerns "that death row inmates are confined to single rooms day and night, purportedly to ensure their mental and emotional stability" and recommended that Japan "relax the rule under which inmates on death row are placed in solitary confinement, ensure that solitary confinement remains an exceptional measure of limited duration, introduce a maximum time limit and require the prior physical and mental examination of an inmate for confinement in protection cells"[201]

Committee against Torture. This committee, made up of international experts, monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When, in 2007, the Japanese government submitted its initial report to the Committee against Torture, it stated:

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201 Human Rights Committee concluding observations (CCPR/C/JPN/CO/5).

> The death penalty system in Japan is a punishment provided for in the Penal Code. It falls under the lawful sanctions referred to in paragraph 1 of Article 1 of the Convention and does not constitute the torture referred to in the Convention. Furthermore, hanging, presently practiced in Japan, is not considered to be inhumanly cruel compared to other methods, and does not fall under cruel, inhuman or degrading punishment. The death penalty system is strictly administered [in conformity with the law].[202]

The Committee responded by expressing serious concerns about conditions in prisons and the way in which the death penalty is applied.[203] It recommended that the government:

- Consider placing medical facilities and staff under the jurisdiction of the health ministry [rather than the Ministry of Justice as at present] [para 17]

- Amend its current legislation in order to ensure that solitary confinement remains an exceptional measure of limited duration, in accordance with international minimum standards [para 18]

- Should take all necessary measures to improve conditions of detention of persons on death row in order to bring them in line with international minimum standards... [para 19]

- Should consider taking measures for an immediate moratorium on executions and a commutation of sentences and should adopt procedural reforms which include the possibility of measures of pardon. A right of appeal should be mandatory for all capital sentences. [para 19].

Special Rapporteur on extrajudicial, summary or arbitrary executions. The Special Rapporteur commented critically in two 2006 reports[204] on the lack of transparency in Japanese death penalty practice. He noted that:

> "The limitations on transparency imposed by Japan... go beyond what is necessary to protect individual rights to privacy and human dignity and undermine the safeguards publicity provides."

He concluded that "the practice of informing death row prisoners of their impending execution only moments before they die, and families only later, was 'inhuman and degrading'".[205]

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202 Japanese government. 1996 report to the Committee against Torture. 2007, para. 145. Available at: http://www2.ohchr.org/english/bodies/cat/cats38.htm

203 Conclusions and recommendations of the Committee against Torture, Japan. CAT/C/JPN/CO/1. Available at: http://www2.ohchr.org/english/bodies/cat/cats38.htm

204 Extrajudicial, summary or arbitrary executions. Report of the Special Rapporteur, Philip Alston. UN document no. E/CN.4/2006/53 and Transparency and the Imposition of the Death Penalty: Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston. Document no. E/CN.4/2006/53/Add.3. Both available at: http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm

205 E/CN.4/2006/53/Add.3, para. 32. In March 2009, a committee recommended to the Minister of Justice that the procedure of informing prisoners of their execution only on the day of the execution should be reformed, and prisoners should be informed on the day preceding their execution (Asahi Shimbun, [2 April 2009). This signal of reform is welcome as a gesture but it fails totally to address the underlying cruelty of the present practice.

The Japanese government has suggested that reforms implemented since that report have resolved the problem. It has introduced a Penal Institution Visiting Committee "composed of a maximum of 10 members appointed by the Minister of Justice from among persons of integrity and insight with a passionate interest in the improvement of the administration of penal institutions." It suggests that "The transparency of correctional administration is secured by establishment of [this] Committee and other measures".[206] However, while such committees are a welcome addition to the external scrutiny of the prison system, the mechanism for recruiting members, their visibility and accountability and public reporting mechanisms have not yet met standards compatible with public accountability.

ABOLISHING THE DEATH PENALTY

IN NEW MEXICO, USA, 2009

"From an international human rights perspective, there is no reason the United States should be behind the rest of the world on this issue. Many of the countries that continue to support and use the death penalty are also the most repressive nations in the world. That's not something to be proud of.

In a society which values individual life and liberty above all else, where justice and not vengeance is the singular guiding principle of our system of criminal law, the potential for wrongful conviction and, God forbid, execution of an innocent person stands as anathema to our very sensibilities as human beings. That is why I'm signing this bill into law."

(Gov. Bill Richardson, remarks on signing a bill abolishing the death penalty in New Mexico, 18 March 2009)

IN THE UNITED KINGDOM, 1965

"When we abolished the punishment for treason -- that you should be hanged and then cut down while still alive, then disembowelled while still alive, and then quartered -- we did not [do so] because we sympathized with traitors, but because we took the view that this was a punishment no longer consistent with our self-respect."

The Lord Chancellor, Lord Gardiner, during the British parliamentary debates on death penalty abolition, 1965

Universal Periodic Review. In May 2008 Japan's human rights record was reviewed in the Working Group on the Universal Periodic Review of the UN Human Rights Council.[207] In the course of the review, many states expressed concerns at the application of the death penalty in Japan, and recommended, inter alia, that the government establishes a moratorium on executions. Amnesty International regrets that the government's reply to these recommendations was to reconfirm its stance on the death penalty, stating that "Japan is not in a position either to consider granting a moratorium on executions or to abolish death penalty."[208]

206 Corrections Bureau, Ministry of Justice. Penal Institutions in Japan, Tokyo, 2008, p.35. "The Minister of Justice compiles both the opinions expressed by the committee to the warden of the penal institution and the measures taken by the warden of the penal institution responding to the opinions, and releases a summary to the public."

207 See Report of the Working Group on the Universal Periodic Review – Japan, A/HRC/8/44.

208 See Addendum to the report of the UN Working Group on the Universal Periodic Review, A/HRC/8/44/Add.1.]

COUNCIL OF EUROPE

Japan and the USA have had observer status at the Council of Europe since 1996.[209] On 25 June 2001 the Parliamentary Assembly of the Council of Europe adopted Resolution 1253 which noted the continuing use of the death penalty in these two countries in breach of requirements for observer status set out in Resolution 93 (26) and urged them to take action to rectify this by 2003.[210]

When no changes were noted, the Assembly adopted a resolution regretting "having to find Japan and the United States, once more, in violation of their fundamental obligation to respect human rights under Statutory Resolution (93)26, due to their continued application of the death penalty".

> "The Assembly asks the Japanese Parliament and Government to continue and deepen its constructive dialogue with the Council of Europe on this issue. In the meantime, it reiterates its demands that the conditions on 'death row' be immediately improved, that the secrecy surrounding executions be ended and that access to post-conviction and post-appeal judicial review be broadened for 'death row' inmates, and supports the Japanese political and NGO movement working towards these aims and towards the establishment of a moratorium on executions."[211]

In 2006, it adopted a further resolution concerning states (including Japan) that had not abolished the death penalty.[212]

NON-GOVERNMENTAL ORGANIZATIONS

Amnesty International has criticized the harsh conditions prevailing in Japanese prisons[213] and the practice of the death penalty both globally and in Japan.[214] Human Rights Watch made a detailed review and critique of prison conditions in Japan in 1995, including conditions faced by death row prisoners.[215] The Federation Internationale des Ligues des Droits de l'Homme (FIDH) has issued two major reports on the death penalty in Japan since 2003.[216] In both reports, the FIDH documented the failure of prison conditions and practices

209 Other countries with observer status to the Council of Europe Committee of Ministers are Canada, Holy See and Mexico.

210 C Ravaud. The Case-law of the institutions of the European Convention on Human Rights. In. Council of Europe, *The Death Penalty -- Beyond Abolition*, Strasbourg2004, pp.97-123.

211 Council of Europe Parliamentary Assembly Resolution 1349 (2003): Abolition of the death penalty in Council of Europe Observer states, Paras 7 and 9. Available at: http://assembly.coe.int/. Japan has not reacted to these resolutions and Amnesty International delegates were left in doubt from discussions in the Foreign Ministry that the government would not change policy just to conform to the resolution.

212 Parliamentary Assembly. Recommendation 1760 (2006). Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty.

213 Amnesty International. "Japan: The Death Penalty: Summary of concerns." AI Index: ASA 22/001/1997.

214 Amnesty International (2006). *'Will this day be my last?': the death penalty in Japan*. AI Index: ASA 22/006/2006. Available at: http://www.amnesty.org/en/library/info/ASA22/006/2006

215 Human Rights Watch (1985). *Prison Conditions in Japan*. New York. http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF

216 FIDH (2003). *The Death Penalty in Japan, A Practice Unworthy of a Democracy*. Paris, available at: http://www.fidh.org/The-Death-Penalty-In-Japan-A; FIDH (2008). *The Law of Silence, Going Against the International Trend*. Paris; available at: http://www.fidh.org/The-law-of-silence-going-against.

associated with the death penalty to meet international standards.

GLOBAL TRENDS IN REDUCTION OF THE USE OF THE DEATH PENALTY

Although some countries abolished the death penalty as long ago as the 19th century,[217] there was no visible international abolitionist movement until the 1960s. When Amnesty International convened an international conference on the death penalty in 1977[218] fewer than 20 countries were totally abolitionist. However, as of early 2009, the situation was as follows:

States abolitionist for all crimes	92
States abolitionist for ordinary crimes only	10
States abolitionist in practice (non-application of the penalty for at least 10 years)	36
States retaining and applying the death penalty	59[219]

US EXPERIENCE WITH MENTAL HEALTH AND THE DEATH PENALTY

Although there are US Supreme Court judgements prohibiting the execution of those with serious mental illness (and mental retardation), in practice mentally ill prisoners are still executed.[220]

A number of Supreme Court judgements bearing on mental health – including *Ford v Wainwright* (1986) and *Atkins v Virginia* (2002) -- all of which contained thoughtful commentary and analysis and form part of US jurisprudence, have prompted further thinking aimed at strengthening legal protection for those who should be excluded from the death penalty under current law. For example, an initiative by the American Bar Association (ABA) distils current thinking by professional bodies on mental health and the death penalty. In 2003 the ABA established a Task Force on Mental Disability and the Death Penalty.[221] The Task Force recommendations were adopted by the ABA and subsequently supported by the American Psychiatric Association and the American Psychological Association. The report first called for exempting from the death penalty people who, at the time of the crime, had dementia or traumatic brain injury severe enough to result in significant limitations both in

217 In the modern era, the state of Tuscany abolished the death penalty in 1786; Venezuela in 1863; San Marino in 1865, and Costa Rica 1877 (Amnesty International, *When the State Kills*... op cit). Japan abolished the death penalty in the 9th century but reintroduced it three centuries later (Yasuda Y, op cit)

218 Amnesty International. Conference for the Abolition of the Death Penalty. Stockholm, 1977.

219 Amnesty International. "Death sentences and executions in 2008", March 2009 AI Index: ACT 50/003/2009. A measure of change is provided by comparison with a survey conducted in 1965 which found that 12 countries had abolished the death penalty completely and a further 11 had abolished it for ordinary crimes in peacetime. (Roger Hood (1996). *The Death Penalty: A World-wide Perspective*. Second revised edition. Oxford: Clarendon Press, p.7

220 Amnesty International. *USA: The execution of mentally ill offenders*. Index: AMR 51/003/2006, 2006.

221 RJ Tabak. "A more rational approach to a disturbing subject." *Human Rights* 34(2), 2007, available at: http://www.abanet.org/irr/hr/spring07/tabakspr07.html. For the report and recommendations see *Mental & Physical Disability Law Report* 30: 668 (Sept.–Oct. 2006).

intellectual functioning or adaptive behaviour. The ABA initiative maintained the spirit of Atkins v Virginia which prohibited the execution of people with mental retardation and widened this to include disabilities of similar effect.

Secondly, the report recommended the non-application of the death penalty for persons with severe mental disabilities "if their demonstrated impairments of mental and emotional functioning at the time of the offence would render a death sentence disproportionate to their culpability."[222]

The third recommendation called for the exclusion of the death penalty in three situations that could arise with prisoners already sentenced to death. These are:

- when a death row inmate wishes to waive appeals and collateral proceedings aiming to set aside his conviction or sentence;

- when an inmate's competence to participate in post-conviction or habeas corpus proceedings becomes impaired;

- where a prisoner is not aware of the nature and purpose of punishment or why the death penalty applies in his (or her) own case.

The ABA also provides that when a prisoner is found incompetent for execution, his death sentence should automatically be commuted to the next most severe punishment for the capital offence in that jurisdiction.

222 Tabak ibid.

7/CONCLUSION

There have been some reforms in the death penalty in recent years but these are very minor. While the introduction of forensic units, prison visiting committees, and liberalisation -- at least in law if not wholly in practice -- of access of prisoners to visitors are to be welcomed, the inherent failings of the death penalty system remain substantially untouched by reform.

The death penalty in Japan is characterized by

- Risk of miscarriages of justice due to the use of the *daiyo kangoku* system and the reliance on confessions.
- Lack of transparency. All aspects of the death penalty are cloaked in mystery. The flow of information necessary for the proper functioning of the criminal justice system is blocked by unjustifiable secrecy.
- There is no recognized training and qualification for forensic psychiatrists that would progressively increase the level of expertise and accountability of expert evidence in death penalty cases.
- Psychiatric evaluators are chosen solely by prosecutor or judge and there is a very limited role permitted to independent medical experts.
- Highly stressful and oppressive conditions of detention, ironically framed in terms of protecting the prisoner's peace of mind.
- Lack of debate about the death penalty and the goals of penal measures.

As one commentator on the Japanese criminal justice system has stated: "the system is so hostile to outside scrutiny, it remains impossible to see or say what many of the problems are."[223] Amnesty International and other human rights monitors and lawyers have had the same experience.

As is the case in the USA,[224] it is likely that persons with mental illness have been and will be executed under current procedures and that they continue to be faced with the death penalty in breach of international standards.

Amnesty International opposes the death penalty and believes that the most effective reform measure would be to abolish it.

223 D Johnson (2006). See [note 13] above.

224 Amnesty International. "USA: The execution of mentally ill offenders." London: Index number AMR 51/003/2006, 31 January 2006. Available at: http://www.amnesty.org/en/library/info/AMR51/003/2006

RECOMMENDATIONS

TO GOVERNMENT

Amnesty International calls on the Japanese government to undertake the following measures:

Moratorium on executions

- establish a moratorium on executions with a view to abolishing the death penalty as provided by UN General Assembly resolution 62/149, adopted on 18 December 2007, and commute without delay all death sentences to terms of imprisonment;
- initiate an informed public and parliamentary debate on abolition of the death penalty.

Commitment to human rights

- Pending abolition of the death penalty, implement all relevant recommendations made by the UN Human Rights Committee and the UN Committee against Torture to bring Japanese law and practice into line with international human rights standards.

- Abrogate or amend criminal code, criminal procedure code and other criminal justice legislation that are in contravention of international human rights standards, either inherently or by the way they are interpreted and implemented.

Review existing cases where mental illness may be a relevant factor

- Initiate an immediate independent review of all cases where there is credible evidence that prisoners sentenced to death are now mentally ill and could fall within the scope of Article 479 of the Code of Criminal Procedure.

Addressing mental disorder or disability after sentencing

- Ensure that a sentence of death is not carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

Transparency

- Ensure that (i) all processes undertaken in the context of capital punishment are made known to the public; (ii) more effective systems for regular review and accountability are put in place; (iii) laws are amended to provide for information flow and access to information by prisoners and their lawyers, by health personnel, by academics and by members of the public.

Divert mental illness cases away from the criminal justice system

- Continue reforms seeking to divert cases of crimes and misdemeanours occurring due to mental illness away from the criminal justice system into a health management framework.

Prison health care

- Transfer the responsibility for the health of prisoners from the Justice Ministry to the Health Ministry. In order to underline the right of prisoners to proper ethical health care and the right of doctors to practise medicine for the patient.

Health care staffing levels

- Review the levels and qualifications of health professional staffing in places of custody. Encourage further study programmes and training for medical, particularly nursing, staff and ensure adequate levels of mental health care within the corrections system.
- Further develop special psychiatric forensic units to ensure that capacity for diagnosing and treating mentally disordered offenders is increased and the number of such offenders in the prison system can be reduced.

Lawyers' access to information about clients

- Ensure that all prisoners are given proper medical assessments at the time of their arrest and regularly thereafter;
- Ensure that the results of every medical examination, as well as any relevant statements by the person in custody and the doctor's conclusions, are recorded in writing by the doctor and made available to the person in custody and his/her lawyer

Access to medico-legal assessments

- Ensure that prisoners (and their lawyers) have the right (within reason) to seek a forensic medical evaluation during the investigation, trial and appeal processes.

Non-execution of prisoners during course of appeals

- End the possibility of prisoners with current appeals for retrial being liable to execution before their appeal is heard, by ensuring the suspensive effect of requests for retrial or pardon.
- Introduce a mandatory system of review in capital cases.

Ensure that both prisoners and families are given reasonable advance notice of the execution dates

- End the practice of not giving notice of the date of an execution to the prisoner significantly in advance of the event;
- End the practice of not notifying the family of the prisoner of the execution until after the execution has occurred. Both families and prisoners should know reasonably in advance when the execution is scheduled to take place.

Improve conditions for prisoners under sentence of death

- End the routine practice of prolonged solitary confinement of prisoners under sentence of death and ensure that solitary confinement is exceptional and of limited duration;
- Ensure that conditions of detention comply with international standards, such as the UN Standards Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Provide meaningful voluntary activities for prisoners under sentence of death.

Evaluate the new prison visiting system

- Conduct a review of the prison visiting system to assess its functioning and identify any reforms that are necessary. Ensure that visiting committees have full, immediate and unhindered access to places of detention (including unannounced visits) and detainees (whom they should be able to meet in private) and unrestricted access to all relevant information.

International commitments

- Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Collaborate with the UN special procedures, including by responding positively to the request of a visit by the UN Working Group on Arbitrary Detention and by considering extending an open invitation to all special procedures
- Reconsider the government's position on the recommendations on the death penalty made during the Universal Periodic Review in May 2008 with the view to accepting and implementing them fully
- Upon abolition of the death penalty, ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

TO PROFESSIONAL BODIES:

Amnesty International encourages Japanese professional bodies to:

- have clearly stated positions against participation by health professionals in capital punishment;

- promote good professional practice in places of detention and urge an end to practices that undermine ethics and the well being of prisoners;

- promote prison health care as a proper responsibility of the Ministry of Health, Labour and Welfare -- the ministry charged with all matters relating to national health -- rather than the Ministry of Justice which is responsible for matters relating to law and order;

- play an increased role in maintaining an overview of ethics within prison health care.

8/APPENDICES

APPENDIX 1: EXTRACTS FROM RELEVANT JAPANESE LAWS[225]

Penal Code (Act 45)

Article 11 (Death Penalty)

(1) The death penalty shall be executed by hanging at a penal institution.

(2) A person who has been sentenced to the death penalty shall be detained in a jail until its execution.

Article 31 (Prescription of Sentence) [i.e. Expiry of liability to the sentence]

Prescription shall have the effect of remitting the sentence of a person who has been sentenced to punishment.

Article 32 (Period of Prescription)

Prescription takes effect when a punishment has not been executed within any of the following periods after a sentence has become final and binding:

(i) Thirty years for the death penalty; …

Article 39 (Insanity and Diminished Capacity)

(1) An act of insanity is not punishable.

(2) An act of diminished capacity shall lead to the punishment being reduced.[226]

Article 68 (Rules for Statutory Reduction)

When there are one or more statutory grounds for reduction of punishment, the following rules shall apply:

(i) When the death penalty is to be reduced, it shall be reduced to imprisonment with or without work either for life or for a definite term of not less than 10 years; …

Article 77 (Insurrection)

(1) A person who commits an act of riot for the purpose of overthrowing the government, usurping the territorial sovereignty of the State, or otherwise subverting constitutional order, thereby committing the crime of insurrection shall be sentenced according to the following distinctions:

(i) A ringleader shall be punished by death or life imprisonment without work; …

Article 81 (Instigation of Foreign Aggression)

A person who agrees with a foreign state and thereby causes the state to exercise armed force against Japan shall be punished by the death penalty.

Article 82 (Assistance to the Enemy)

A person who, when a foreign state exercises armed force against Japan, sides with the state

225 The laws in this appendix are taken from Japanese Cabinet Secretariat web-site: (http://www.cas.go.jp/jp/seisaku/hourei/data2.html). The English translations provided at this site are unofficial documents.

226 In many Japanese commentaries "diminished capacity" is translated as "quasi-insanity".

by engaging in the military service of such state, or otherwise affords military advantage to such state, shall be punished by the death penalty or imprisonment with work either for life or for a definite term of not less than 2 years.

Article 108 (Arson of Inhabited Buildings)

A person who sets fire to and burns a building, train, tram, vessel or mine actually used as a dwelling or in which a person is actually present shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 5 years.

Article 119 (Damage to Inhabited Buildings by Flood)

A person who causes a flood to damage a building, train, tram, or mine actually used as a dwelling or in which a person is actually present shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 3 years.

Article 126 (Overturning of Trains)

(1) A person who overturns or destroys a train or a tram in which a person is actually present shall be punished by imprisonment with work for life or for a definite term of not less than 3 years.

(2) The same shall apply to a person who capsizes, sinks or destroys a vessel in which a person is actually present.

(3) A person who, by commission a crime prescribed under the preceding two paragraphs, causes the death of another person shall be punished by the death penalty or life imprisonment with work.

Article 146 (Pollution of Water Supplies with Poisonous Materials and Causing Death Thereby)

A person who pollutes water which is supplied to the public for drinking purposes or a water supply system with poisonous materials or any other substance harming human health, shall be punished by imprisonment with work for a definite term of not less than 2 years. If the death of another is thereby caused, the offender shall be punished by the death penalty or imprisonment …

Article 199 (Homicide)

A person who kills another shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 5 years.

Article 240 (Robbery Causing Death or Injury)

When a person who has committed the crime of robbery causes another to suffer injury at the scene of the robbery, the person shall be punished by imprisonment with work for life or for a definite term of not less than 6 years, and in the case of causing death, the death penalty or imprisonment with work for life shall be imposed.

Article 241 (Rape at the Scene of a Robbery; Causing Death Thereby)

When a person committing the crime of robbery rapes a female, imprisonment with work for life or for a definite term of not less than 7 years shall be imposed, and in the case of causing death thereby, the death penalty or imprisonment for life with work shall be imposed.

Code of Criminal Procedure (Act 131)

Article 89

The request for bail shall be granted, except when:

(i) The accused has allegedly committed a crime which is punishable by the death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work

whose minimum term of imprisonment is one year or more;

(ii) The accused was previously found guilty of a crime punishable by the death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work whose maximum term of imprisonment was in excess of ten years; ...

Article 250

The statute of limitations shall be completed upon the lapse of:

(i) 25 years for offences punishable with death; ...

Article 314

In case the accused is in the condition of mental derangement, the public trial procedure shall be suspended by ruling for the period while continuing such condition after hearing the opinion of a public procurator and the counsel: Provided, That in case it is obvious that the decision of not guilty, acquittal, remission of penalty, or dismissal of public prosecution be given, such decision may forthwith be made without awaiting the appearance of the accused. ...

Article 479

1. If a person condemned to death is in a state of insanity, the execution shall be stayed by order of the Minister of Justice.

2. If a woman condemned to death is pregnant the execution shall be stayed by order of the Minister of Justice.

3. When the execution of the death penalty has been stayed under the provision of the preceding two paragraphs, the penalty shall not be executed unless an order is given by the Minister of Justice subsequent to recovery from the state of insanity or delivery....

Act on Penal Detention Facilities and Treatment of Inmates and Prisoners (Act 50)

Article 32 (Principle of Treatment for Inmates Sentenced to Death)

(1) Upon treatment of an inmate sentenced to death, attention shall be paid to help him/her maintain peace of mind.

(2) Measures such as counselling or lectures which may contribute to help the inmate sentenced to death maintain peace of mind shall be taken by obtaining cooperation from nongovernmental volunteers.

Article 36 (Mode of Treatment for Inmates Sentenced to Death)

(1) Treatment of an inmate sentenced to death shall be conducted in an inmate's room throughout day and night, except where it is deemed appropriate to conduct it in the outside of the inmate's room.

(2) The room of an inmate sentenced to death shall be a single room.

(3) No inmates sentenced to death shall be permitted to make mutual contacts even in the outside of the inmate's room, except where deemed advantageous in light of the principle of treatment prescribed in paragraph (1) of Article 32.

Article 120 (Visitors)

(1) In cases where any of the persons listed in the following items requests to visit an inmate sentenced to death (except those having the status as an unsentenced person; hereinafter the same shall apply in this Division), the warden of the penal institution shall permit the inmate sentenced to death to receive the visit except the cases where it is prohibited pursuant to the provision of paragraph (3) under Article 148 or the provisions of the next Section:

(i) A person who is a relative of the inmate sentenced to death;

(ii) A person with the necessity to have a visit in order to carry out a business pertaining to personally, legally, or occupationally important concern of the inmate sentenced to death, such as reconciliation of marital relations, pursuance of a lawsuit, or maintenance of a business;

(iii) A person whose visit is deemed instrumental to help the inmate sentenced to death maintain peace of mind.

(2) In cases where a person other than those listed in the items of the preceding paragraph requests to visit an inmate sentenced to death, if it is deemed that there is a circumstance where the visit is necessary for the maintenance of good relationship with the person or for any other reasons, and if it is deemed that there is no risk of causing disruption of discipline and order in the penal institution, then the warden of the penal institution may permit the inmate sentenced to death to receive the visit.

Article 121 (Attendance and Recording during Visits)

The warden of the penal institution shall have a designated staff member attend at a visit to an inmate sentenced to death, or make a sound or video recording of it; provided, however, that this shall not apply in cases where there is a circumstance to be concluded that not having the attendance or the sound or video recording is appropriate in order to protect such legitimate interest of the inmate sentenced to death as arrangements for a lawsuit, and if such conclusion is deemed appropriate.

Article 122 (Suspension and Termination on Visits)

The provisions of Article 113 (except for (d) under item (ii) of paragraph (1)) and Article 114 shall apply mutatis mutandis to the visits received by an inmate sentenced to death. In this case, the phrase "twice per month" in paragraph (2) of said Article shall be read as "once per day."

Article 139 (Letters Permitted to Send or Receive)

(1) The warden of the penal institution shall permit an inmate sentenced to death (except those having the status as an unsentenced person; hereinafter the same shall apply in this Division) to send or receive the letters under the following items except where it is prohibited by the provisions of this Division, paragraph (3) of Article 148, and the next Section.

(i) Letters the inmate sentenced to death sends to or receives from his/her relative;

(ii) Letters which the inmate sentenced to death sends and receives in order to carry out a business pertaining to personally, legally, or occupationally important concern of the inmate sentenced to death, such as reconciliation of marital relations, pursuance of a lawsuit, or maintenance of a business;

(iii) Letters deemed to be instrumental to help the inmate sentenced to death maintain peace of mind.

(2) The warden of the penal institution may permit an inmate sentenced to death to send or receive letters other than those listed in the preceding paragraph in cases where it is deemed that there is a circumstance where the sending or receiving is necessary for the maintenance of good relationship with the addressee, or for any other reasons, and if it is deemed that there is no risk of causing disruption of discipline and order in the penal institution.

Article 178 (Execution of Death Penalty)

(1) The death penalty shall be executed at an execution site inside a penal institution.

(2) The death penalty shall not be executed on Sunday, Saturday, holidays prescribed in the Act on National Holiday (Act No. 178 of 1948), January 2nd, January 3rd, and from December 29th to December 31st inclusive.

Article 179 (Unfastening of Halter)

On the execution of the death penalty, the halter shall be unfastened after five minutes has elapsed from the time when the death of the hanged person was confirmed.

APPENDIX 2: INTERNATIONAL STANDARDS ON THE DEATH PENALTY

International Covenant on Civil and Political Rights (ICCPR)

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

ICCPR Second Optional Protocol

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

UN Economic and Social Council (ECOSOC) Resolution 1984/50. Safeguards guaranteeing protection of the rights of those facing the death penalty[227]

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

227 "Safeguards guaranteeing protection of the rights of those facing the death penalty." Adopted by Economic and Social Council resolution 1984/50 of 25 May 1984. Available at: http://www.unhchr.ch/html/menu3/b/h_comp41.htm

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court 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.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

ECOSOC RESOLUTION 1989/64 [228]

1. Recommends that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by:

(a) Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases;

(b) Providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence;

(c) Establishing a maximum age beyond which a person may not be sentenced to death or executed;

(d) Eliminating the death penalty for persons suffering from mental retardation or extremely

228 "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty." Adopted by Economic and Social Council resolution 1989/64, 24 May 1989.

limited mental competence, whether at the stage of sentence or execution;

UN General Assembly Resolution on Moratorium on the Use of the Death Penalty (2007) [229]

The General Assembly…

1. Expresses its deep concern about the continued application of the death penalty;

2. Calls upon all States that still maintain the death penalty to:

(a) Respect international standards that provide safeguards guaranteeing the protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984;

(b) Provide the Secretary-General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing the protection of the rights of those facing the death penalty;

(c) Progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed;

(d) Establish a moratorium on executions with a view to abolishing the death penalty;

UN Commission on Human Rights Resolution 2005/59. Question of the death penalty

The Commission on Human Rights, …

5. Calls upon all States that still maintain the death penalty:

(a) To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions;

(b) Progressively to restrict the number of offences for which the death penalty may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply;

(c) To make available to the public information with regard to the imposition of the death penalty and to any scheduled execution;

(d) To provide to the Secretary-General and relevant United Nations bodies information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty;

6. Calls upon all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty;

7. Urges all States that still maintain the death penalty: …

(c) Not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person;

(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence; …

(i) To ensure that, where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering …;

(j) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending.

229 UN General Assembly Sixty-second session Third Committee Agenda item 70 (b). Moratorium on the Use of the Death Penalty. Document no. A/C.3/62/L.29, 1 November 2007.

APPENDIX 3: INTERNATIONAL MEDICAL ETHICS

Declaration on the Participation of Psychiatrists in the Death Penalty
(World Psychiatric Association, 1989)

The following declaration was adopted by the General Assembly of the World Psychiatric Association at its World Congress in Athens in October 1989.

Psychiatrists are physicians and adhere to the Hippocratic Oath-- "to practice for the good of their patients and never to do harm".

The World Psychiatric Association is an international association with 77 Member Societies.

Considering that the United Nations' Principles of Medical Ethics enjoins physicians - and thus psychiatrists - to refuse to enter into any relationship with a prisoner, other than one directed at evaluation, protecting or improving their physical and mental health, and further, considering that the Declaration of Hawaii of the WPA resolves that the psychiatrist shall serve the best interests of the patient and treat every patient with the solicitude and respect due to the dignity of all human beings and that the psychiatrist must refuse to cooperate if some third party demands ' actions contrary to ethical principles.

- Conscious that psychiatrists may be called on to participate in any action connected to executions, declares that the participation of psychiatrists in any such action is a violation of professional ethics.

Declaration of Madrid
(World Psychiatric Association, 1996)

Under no circumstances should psychiatrists participate in legally authorized executions nor participate in assessments of competency to be executed.[230]

Physician Participation in Capital Punishment
(World Medical Association, 1981-2008)

Resolved, that it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process, including its planning and the instruction and/or training of persons to perform executions.

The World Medical Association

Requests firmly its constituent members to advise all physicians that any participation in capital punishment as stated above is unethical.

Urges its constituent members to lobby actively national governments and legislators against any participation of physicians in capital punishment.

Torture, Death Penalty and Participation by Nurses in Executions
(International Council of Nurses, 1998-2006)

While ICN considers the death penalty to be unacceptable, clearly the nurse's responsibility

230 Approved by the General Assembly of the World Psychiatric Association in Madrid, Spain, on 25 August 1996 and subsequently revised. Available at http://www.wpanet.org/content/madrid-ethic-engish.shtml

to a prisoner sentenced to death continues until execution.

ICN urges its member national nurses associations (NNAs) to lobby for abolition of the death penalty; to actively oppose torture and participation by nurses in executions; and to develop mechanisms to provide nurses with confidential advice and support in caring for prisoners sentenced to death or subjected to torture.