

Ghosh, Yamashiro and the United Nations -- Japan's Coercive Police Practices in the International Spotlight

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In an effort to combat abuse of police powers by the world's most repressive regimes, the United Nations General Assembly adopted a "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" at a plenary meeting on December 9, 1988. Among other things, these rules declare that "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."¹ Three years later the UN Commission on Human Rights created a five member "Working Group" charged with investigating "cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights" or in treaties or other international agreements.²

The detention and prosecution of former Nissan CEO Carlos Ghosn have brought international attention to the severe treatment of individuals held in police detention in Japan.³ In recent years, Japanese commentators have frequently used the term *hitojichi shihō*, "hostage justice," to describe police practices applied to persons accused of crime. One writer recently defined hostage justice as "The tendency to lengthy detentions of suspects and defendants who do not confess."⁴ These detention practices conflict directly with clear language in the world's most comprehensive human rights treaty, which declares that "It shall not be the general rule that persons awaiting trial shall be

detained in custody..."⁵ Japan ratified the Covenant in 1979.

But "lengthy detentions" is merely the starting point. If we ask what happens during Japan's detentions, we learn that suspects are often interrogated for six to eight hours per day and that legal counsel are not allowed to be present. We also learn that when suspects invoke the constitutional right to remain silent, interrogations do not end. Interrogators continue to question and harangue their suspects, sometimes hour after hour, day after day, with the objective of breaking the suspect's will so that he will forfeit the constitutional right and speak. Such interrogations can continue until the government files formal charges, which can be delayed for 23 days on a single charge. If the suspect is indicted, the interrogations ordinarily cease, but prosecutors' requests for denials of bail are typically approved, so detentions may continue for many months while attorneys and prosecutors prepare for trial.

Inspired by the notoriety attracted by the detention of the famed international executive, a group of more than one thousand Japanese lawyers and other legal professionals issued a "Call to Eliminate Japan's 'Hostage Justice' System" on April 10, 2019.⁶ According to the authors, "The 'hostage justice' system uses detention beyond its original purpose of securing suspects' appearance in court and violates the human rights guaranteed by the Constitution of Japan, including physical freedom, the right to remain silent, and the

right to a fair trial.”⁷



Japanese lawyers discussing the UN Principles on Arbitrary Detention at a symposium held at the headquarters of Japan's national bar association (Japan Federation of Bar Associations) on June 4, 2019.

United Nations bodies have repeatedly chastised Japan for its coercive police interrogations, insisting that the country should stop lengthy pretrial detentions, should allow attorneys to be present during interrogations and should take other steps to ensure that the presumption of innocence is respected. For example, in 2008 the United Nations Human Rights Committee wrote “The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions.” The Committee repeated these complaints in 2014. An entirely separate body, the UN Committee Against Torture has written that Japan’s practice of prolonged detention “coupled with insufficient procedural guarantees for the detention and interrogations of detainees, increases the possibilities of abuse of their rights, and may lead to a de facto failure to

respect the principles of presumption of innocence, right to silence and right of defence.”⁸



Leigh Toomey, member of the UN working group on arbitrary detention addresses the media flanked by UN Resident Coordinator Una McCauley (left) and Jose Antonio Guevara Bermudez - UN Working Group on Arbitrary Detention - Pic by Ruwan Walpola

UN Working Group on Arbitrary Detentions on Dec. 16, 2017 urges reforms to end arbitrary detention; safeguard personal liberty rights

Japan has blithely ignored these criticisms and recommendations for reform.

Ghosn’s multiple arrests and detentions bear many similarities to the treatment of Okinawan anti-base protester Yamashiro Hiroji two years earlier.⁹ Like Ghosn, Yamashiro was subject to so-called “re-arrests,” meaning serial arrests on different charges that enable police interrogators to restart the standard 23-day clock for interrogations.¹⁰ Like Ghosn, Yamashiro was not only denied the presence of attorneys during interrogation sessions, he was also denied all visitors during months of detention, except for brief visits outside the interrogation room from his attorneys.

This is an especially startling aspect of Japan’s detention practices. Suspects who refuse to confess are not only held in lengthy detentions – a total of 139 days in Mr. Ghosn’s case and 153 days for Mr. Yamashiro – but they are

commonly denied contact with anyone except attorneys throughout the ordeal. Once thought to be an extraordinary measure in Japan, it has become commonplace. In 2017, this restriction was applied in more than 37% of all cases.¹¹

The authors of the 1988 Principles were especially concerned about prohibitions of contact with family members and the opportunity to communicate with the outside world. Principle 15 commands that “communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days,” subject to very limited exceptions.¹² Principle 19 repeats this message: “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”¹³

Mr. Ghosn was released on bail on April 25, but the bail conditions include a prohibition on contact with his wife. Ghosn’s lawyers filed a challenge to this condition the same day, relying on Article 17 of the International Civil and Political Rights which states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation,” but it was summarily rejected by Tokyo District Court a few days later and the rejection was quickly upheld by Japan’s Supreme Court.¹⁴

The obvious purpose of these measures is to induce suspects to confess. If the suspect signs off on documents prepared by his interrogators, he can expect to be quickly released. Of course, this places the suspect at a severe disadvantage in the trial to come.

The United Nations Working Group on Arbitrary Detentions released a formal Opinion

on Yamashiro’s treatment last year. It found that his detention violated international law on multiple counts: denial of due process in a criminal prosecution, denial of freedom of speech, and finally deprivation of liberty on the grounds of “discrimination against a civic activist aimed at and resulting in ignoring the equality of human beings.”¹⁵ The Opinion takes particular exception to denial of contact with a spouse: “It is difficult for instance to accept the reasonableness or necessity of initially prohibiting Mr. Yamashiro’s contact with his wife. The Government offers no justification other than vague assertions of sufficient probable cause.”¹⁶

Yamashiro was arrested three times, on October 17, 2016 for cutting a strand of wire fence, on October 20, 2016 for injuring a government official during an anti-base demonstration,¹⁷ and on November 29, 2016 for joining others in placing concrete blocks in a road to block construction traffic. The concrete block incident took place in January 2016, ten months before the arrest. Japanese police were on the scene but did not interfere or arrest anyone at that time.

The UN Working Group was dumbfounded by this “re-arrest” procedure, writing that the Japanese government “did not explain why Mr. Yamashiro was arrested on 20 October 2016 for the alleged assault of an Okinawa Defense Bureau officer on 25 August 2016....A plausible explanation is even more wanting for the 10-month lapse of time between Mr. Yamashiro’s third arrest on 29 November 2016 and the alleged brick-laying and sit-in in front of the construction site between 28 and 30 January 2016.” The Working Group concluded that the reason for the staggered timing of the arrests was to prolong the detentions.¹⁸

News agencies report that the Ghosn family has contacted the UN Working Group on Arbitrary Detentions with a request for investigation.¹⁹ According to documents seen by

Agence France Press, Ghosn's attorneys argue that "the prohibition of any direct contact with his wife, appear to be abuse aimed at tiring him out psychologically and to put him in a position of weakness... in violation of the right to a fair trial." Given the similarity of the detention practices and the release of the Yamashiro

Opinion just last year, it is hard to imagine that the Working Group will reach a conclusion favorable to the Japanese government.

According to news reports, the Ghosn trial is expected to commence in Spring 2020. Can it be the government's intention to separate the family for the rest of this year and beyond?

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Notes

- ¹ See [here](#).
- ² See [here](#). A brief history of the Working Group is available [here](#). See also the [1992 report which sets out the mandate and investigative practices of the Working Group](#).
- ³ The Asahi provides a convenient time line of Ghosn's multiple arrests and detentions to April 25, 2019 [here](#).
- ⁴ Kiriya Keiichi, "Ghosn jiken to hitojichi shihō no yami," *Sekai*, Feb. 2019, p. 42.
- ⁵ International Covenant on Civil and Political Rights, Article 9. The full text is [here](#).
- ⁶ "Call to Eliminate Japan's 'Hostage Justice' System by Japanese Legal Professionals," an English translation, is available [here](#). See also [here](#). [Japan's national bar association sponsored a symposium on the Working Group on June 4](#).
- ⁷ *Ibid.*
- ⁸ UN Human Rights Committee, "Concluding Observations on the 5th Periodic Report of Japan, 30 October 2008," No. 19 and "Concluding Observations on the 6th Periodic Report of Japan, 20 August 2014." UN Committee Against Torture, "Conclusions and Recommendations, 3 August 2007." Both Committees are established by respective treaties to which Japan is a party. See also [Lawrence Repeta, U.N. Committee Faults Japan Human Rights Performance, Demands Progress Report on Key Issues](#)
- ⁹ [Here](#) is a summary providing dates of the Ghosn arrests and detentions.
- ¹⁰ The published opinion of the Working Group in the Yamashiro case provides a convenient timeline of arrests and detentions. "[Opinion No. 55/2018 concerning Yamashiro Hiroji \(Japan\)](#)," A list of Opinions and other documents issued by the Working Group is available [here](#). See [here](#).
- ¹¹ 2018 Attorneys White Paper (*bengoshi hakusho*), p. 90.
- ¹² "[Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#)," No. 15.
- ¹³ *Ibid.*, No. 19.
- ¹⁴ The text of the appeal is available on [the blog of Takano Takashi](#), one of Ghosn's attorneys. The brief order of the Supreme Court is [here](#).
- ¹⁵ "[Opinion No. 55/2018 concerning Yamashiro Hiroji \(Japan\)](#)," para. 80.
- ¹⁶ *Ibid.*, para. 69. Yamashiro was ultimately found guilty on all counts. He presently lives under the weight of a three-year suspended sentence. See [here](#). His punishment for acts

related to common forms of political expression incited the UN Special Rapporteur on Free Expression to write, “The Special Rapporteur expresses serious concern that Mr. Yamashiro’s suspended sentence not only restricts him from any further exercise of his rights, but risks proving a broader deterrent against the right of freedom of assembly.” Follow up on country visit (to Japan), para. 11, [here](#).

¹⁷ The reason the second arrest took place only three days after the first was apparently that the initial grounds for detention were so flimsy that a judge refused to approve detention. This would lead to an immediate second charge on October 20, 2016.

¹⁸ *Ibid.*, paras. 66–67.

¹⁹ Behrouz Mehri, “Ghosn family seeks U.N. help against ‘judicial persecution’ in Japan,” (AFP) May 27, 2019, available [here](#) (accessed Sept. 18, 2019).