Japan’s Comments on the Draft General Comment No.36 on Article 6 of

the International Covenant on Civil and Political Rights

In response to the Human Rights Committee call for comments, the Government of Japan would like to submit the following comments on the Draft General Comment No.36 on article 6 of the International Covenant on Civil and Political Rights (the Covenant), after careful consideration of the draft from a legal perspective.

1 Overview

The Government of Japan understands that the General Comments of the Human Rights Committee is the Committee’s view on interpretation of the Covenant, and it does not change or revise the provisions of the Covenant and is not legally binding to the State Parties. The Government of Japan also believes that careful consideration is required when the General Comments refer to fields and matters stipulated by other treaties. It is important for the Committee to produce additional value when making its General Comments, within the scope of the Covenant, taking into consideration the above mentioned aspects.

2 Other Specific Comments

**I. General remarks**

[Paragraph 5]

Regarding the first sentence, the expression “countries which have not yet abolished the death penalty” is inappropriate because it appears to be based on the assumption that the abolition of the death penalty is obligated to all States parties. In this regard, it should be replaced by appropriate expressions such as *“States parties that have the death penalty”*.

[Paragraph 9]

There is a huge leap in logic between any “legal restrictions on the ability of women to seek abortion” and “a pregnant woman undertakes unsafe abortion”. Even if a State party prohibits abortion, it does not necessarily require a pregnant woman to undertake unsafe abortion, thus it would only be in extremely limited circumstances that the State is responsible for a woman’s death as a result of her undertaking unsafe abortion. This paragraph, especially from the second to the fourth sentence, does not address such leap properly, and therefore the Government of Japan proposes duly modifying the entire paragraph.

[Paragraphs 12-13]

The Committee should take into careful account past and current discussions, recommendations and agreements in international organizations and fora in which experts of conventional weapons and weapons of mass destruction participate, such as the Convention on Certain Conventional Weapons (CCW) and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

The Committee should also take into account progress made in the discussions about lethal autonomous weapons systems (LAWS) at the Convention on Certain Conventional Weapons (CCW) which decided to establish a group of governmental experts on LAWS that will meet this year. In the previous informal discussions at the CCW, for example, many Contracting Parties expressed their concern that dual-use technology which could be used for LAWS such as artificial intelligence or robotics, and restriction on development of those technologies will hinder the healthy development of science and industry.

Therefore, the Government of Japan proposes at least deleting “developed and” in the 3rd sentence of Paragraph12.

**II. The Prohibition against Arbitrary Deprivation of Life**

[Paragraph 16]

Regarding the last sentence, the expression “and subject to a number of strict conditions elaborated in part IV below” should be deleted if the necessary modifications, which the Government of Japan proposes, are not made in part IV.

[Paragraph 19]

Regarding the second sentence, the Government of Japan proposes replacing the word “Legislation” with *“laws, regulations and rules”*, because the appropriate formats of the code of conduct for the law enforcement organs are different among States Parties.

[Paragraph 21]

The meaning of “violate provisions of the Covenant other than article 6” in the first sentence is unclear. The Covenant provides for various rights of the individual and obligations of States parties. Thus, it is inappropriate to regard all deprivation of lives resulting from the acts or omissions that violate any of the provisions other than article 6 as arbitrary in nature without any exceptions.

It is better to clarify the scope of conducts which are to be blamed by standards or conditions such as causation. Thus, the Government of Japan proposes that the first sentence be amended as follows, “. . . acts or omissions that violate *relevant* provisions of the Covenant other than article 6 are, as a rule, arbitrary in nature *if there is cause and effect between the violation of the relevant provisions and the deprivation of life*”.

**III. The Duty to Protect Life**

[Paragraph 29]

The Government of Japan would like to make sure whether the following understanding is correct or not:

“The necessary medical care” indicates the access to common medical treatment given to individuals, but does not include so-called advanced medical treatment.

Regarding “regularly monitoring their health”, the obligation does not include checkups such as complete medical checkups, which are carried out carefully, requiring considerable amounts of time.

[Paragraph 32]

 Regarding the third sentence, the Government of Japan fully understands the importance of autopsy in order to confirm the cause of the victim’s death. However, in order to establish the truth, autopsy has to be carried out by an unbiased forensic pathologist under circumstances wherein the impartiality of the autopsy is secured. Therefore, it is not necessarily appropriate to carry out the autopsy “in the presence of a pathologist representing the victims’ family”. In addition, if the details of the investigation or contents of the evidence are made public during the investigation, it often has a negative influence on further investigations.

For these reasons, the Government of Japan proposes deleting “representing the victims’ family” and replacing “whenever possible” with *“whenever appropriate”.*

 Regarding the fifth sentence, the meaning of “findings, conclusions and recommendations” is unclear. Making the full result of an investigation public may have a negative impact on relevant parties’ honor or privacy or ongoing criminal trials. The Government of Japan would like to draw attention to the fact that the result of the investigation will be duly revealed in the perpetrator’s criminal trial.

On the other hand, the Government of Japan understands that the protection of relevant parties’ privacy or honor and prevention of negative influence on the ongoing investigations and trials are all within the “public interest”. In that case there is no need to modify this sentence. However, if it is not the case, the Government of Japan requests that “and make public . . . recommendation” be deleted or duly modified.

[Paragraph 33]

First of all, the meaning of “unnatural death” in the first sentence is unclear.

Moreover, it is inappropriate to presume that all the deaths which occur in custody are arbitrary deprivation of life by State authorities, because the causes of the death are various. On the contrary, a lot of States parties including Japan have taken measures such as medical treatments in order to protect the right to life of inmates. The first sentence fails to take into account such efforts by the States parties, and it is therefore very difficult for the Government of Japan to accept the first sentence.

In addition, under the Japanese Criminal Procedure Code, generally, the defendant is presumed to be innocent unless prosecution proves the case beyond a reasonable doubt, in order to protect the defendant’s fundamental rights.

Thus, it is extremely difficult for the Government of Japan to presume that arbitrary deprivation of life has been carried out by State authorities based only on the existence of “reliable reports of an unnatural death”, because such presumption switches the burden of proof to the defendant in the criminal procedure against the State official [and he/she has to prove that the death was not caused by his/her misconduct].

For these reasons, the Government of Japan proposes modifying the first sentence to *“loss of life occurring in custody, especially when accompanied by reliable reports of unnatural death, may create a suspicion of arbitrary deprivation of life by State Authorities, which should be addressed by proper investigation”.*

In addition, the scope of “reliable reports” is unclear. It should be clarified in a more appropriate way such as by adding some examples.

[Paragraph 34]

 Regarding the third sentence, the current sentence can be construed to mean that every extradition to a country which has the death penalty violates article 6. Therefore, the Government of Japan proposes adding *“unless credible and effective assurances against the imposition of the death penalty in violation of article 6 of the Covenant have been obtained”* at the end of this sentence.

Regarding the fourth sentence, the Government of Japan suggests deleting the expression, “or to deport an individual to an extremely violent country in which he has never lived, has no social or family contacts and cannot speak the local language”.

Article 6 features provisions on the right to life and the death penalty. The act of deporting an individual to a country in which he/she has never lived, has no social or family contacts and cannot speak the local language is not directly derived from a real risk of deprivation of his/her life. Thus, to deport such individual is not inconsistent with this article.

 In addition, if it is assumed that it is inconsistent with article 6 to deport an individual to a country in which he/she has never lived, has no social contacts and cannot speak the local language, and, on the other hand, that it is not inconsistent with article 6 to deport an individual to a country in which he/she has lived in the past, has social or family contacts and can speak the local language, the Government of Japan considers that such a view of making a difference in administration according to the said assumption does not correspond to the intention of article 6.

 Moreover, while the meaning of “extremely violent country” is unclear, if it were to say “to deport an individual derives the real risk of deprivation of his/her life”, such real risk should be accounted for regardless of whether or not he/she has lived in the country, has social and family contacts, and can speak the local language. The Government of Japan supposes that this view is already included in the first sentence of paragraph 34: “The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that they would be deprived of their life in violation of article 6 of the Covenant”.

[Paragraph 35]

Regarding the first sentence, the Government of Japan would like to clarify the meaning of “broader than the scope of the principle of *non refoulement* under the international refugee law” and what exactly “the scope of the principle” refers to here.

According to the *non refoulement* principle under international refugee law, deportation or other procedures may be suspended due to would-be threats that are not limited to life (i.e. would-be threat to freedom). Therefore, the obligation not to extradite, deport or otherwise transfer pursuant to article 6 is not always broader than the scope of the principle of *non-refoulement* under international refugee law. For this reason, the Government of Japan considers that “may be” is more appropriate than “is”.

**IV. Imposition of the death penalty**

[Paragraph 37]

 The Government of Japan requests the modification of the first sentence because it may appear logically incorrect. The phrases “firstly, to state parties that have not abolished the death penalty” and “secondly, to the most serious crimes” are mentioned in parallel in the draft comment, but these are not used in parallel in article 6.

 The Government of Japan suggests modifying the second sentence as follows, *“As article 6 is the provision that requires respect for the inherent right to life, the application of the death penalty should be narrowly construed”.*  Describing paragraph 1 of article 6 as “anomalous” is a subjective evaluation. Therefore, the word “anomalous” is inappropriate.

[Paragraph 38]

Regarding the first sentence, “States parties” in this paragraph could refer to either “States parties of the Second Optional Protocol” or “States parties of the Covenant”. This is confusing and therefore a different wording should be allocated to those two States parties.

 Regarding the sixth sentence and the last sentence, the Covenant and the Second Optional Protocol do not regulate the way we cooperate with other countries on the execution of sentence. It is incorrect to say that cooperation to a country which has the death penalty always violates article 6 of the Covenant or the Second Optional Protocol. Therefore, the Government of Japan proposes inserting “*in violation of article 6 of the Covenant*” after “against the imposition of the death penalty” in the sixth sentence, and deleting the last sentence.

[Paragraph 39]

 Regarding the second sentence, a perpetrator may commit an armed robbery, piracy or sexual offences, recognizing that it would result in the death of the victim. In such cases, it is irrational to prohibit the application of the death penalty. Thus, the Government of Japan proposes removing these three offences from this sentence. Moreover, other offenses may also result in death of the victim and the perpetrator may have been aware of it. Therefore, *“In principle”* should be inserted at the beginning of this sentence.

 Regarding the third sentence, the Government of Japan proposes inserting “basically” in this sentence. For example, in a most heinous murder case, there may be a perpetrator who joins only a part of the conspiracy and does not conduct the actual act of murder by him/herself, but still is regarded as a principal figure who committed his/her own offense by making use of others. In such cases, it is irrational to prohibit the application of the death penalty.

[Paragraph 43]

The Government of Japan proposes deleting the fifth and the sixth sentences (starting with “On the other hand”).

From the viewpoint of fairness between those who have already been executed and those who have not, it may still be possible to execute the death penalty on individuals for whom the sentence has already been finalized before the abolition of the death penalty even after its removal from the Penal Code. Thus the retroactive application of the abolition of the death penalty should be decided by respective States Parties based on various factors including popular sentiment.

[Paragraph 44]

 Regarding the first sentence, the expression “States parties that have not yet abolished the death penalty” is inappropriate because it appears to be based on the assumption that the abolition of the death penalty is obligated to all States parties. It should be replaced by another appropriate expression such as *“States parties that have the death penalty”*.

 Regarding the second sentence, although the Government of Japan respects article 7, the Government of Japan must say that the “failure to respect article 7 would inevitably render the execution arbitrary in nature” in this sentence is misleading, because it appears to mean that the death penalty is deemed to be arbitrary in nature as long as there is any single violation of article 7 in the entire criminal procedure which is the basis of the death penalty, even if such violation is totally irrelevant to and has no influence on the judgement or execution of the death penalty. Thus, the Government of Japan proposes modifying this sentence by replacing “would” with *“could”* and removing “inevitably”.

 Regarding the fifth sentence, an individual sentenced to death has been aware of the fact that the death penalty will be executed on him/her ever since the judgement was rendered. Therefore, the fact that an individual sentenced to death is not notified of the exact date of execution in advance does not necessarily constitute “a form of ill-treatment”. If an individual sentenced to death was notified of the exact date of execution in advance, he/she would rather lose his/her mental stability and suffer tremendous agony. Moreover, an individual sentenced to death could obstruct the execution based on such notification. Thus, it should not be regarded as “a form of ill-treatment” even if an individual sentenced to death is not notified of the exact date of the execution in advance. In this respect, the Government of Japan proposes deleting this sentence entirely.

Regarding the last sentence, while the Government of Japan considers it important to maintain the mental stability of individuals sentenced to death, solitary confinement is not always "harsh" for them. This sentence is not appropriate since it regards solitary confinement as harsh or stressful conditions without exception. Therefore, the Government of Japan proposes deleting "solitary confinement" in this sentence.

[Paragraph 45]

Regarding the second sentence, the Government of Japan proposes deleting “during criminal interrogation, preliminary hearings”. Due process in the interrogation or preliminary hearings can be sufficiently implemented without the attendance of a defense attorney. Thus, it is unreasonable to regard interrogations and preliminary hearings as violations of article 14 just because a defense attorney is not present without examining the appropriateness of those procedures.

[Paragraph 46]

There is a leap in logic to regard the imposition of the death penalty as a violation of article 6 just because there is a failure to promptly inform detainees of their right to consular notification or a failure to afford individuals about to be deported with the opportunity to avail themselves of available appeal procedures. The Government of Japan must say that these examples have little relevance to the imposition of the death penalty, and therefore they can be the basis for rendering the imposition of the death penalty contrary to article 6 only in extremely exceptional circumstances. Thus, the Government of Japan proposes replacing “can violate” in the second sentence with *“may, in certain circumstances, violate”*.

[Paragraph 47]

 Regarding the second sentence, while the Government of Japan agrees with the first sentence, it believes that this sentence does not justify the second sentence. There is no reason or necessity to re-examine past convictions if they were established based on the proof beyond a reasonable doubt in their original criminal trials. Therefore, the Government of Japan proposes inserting *“which were not established beyond a reasonable doubt”* subsequent to “past convictions” in the second sentence.

 Regarding the last sentence, the Government of Japan proposes deleting this sentence entirely, because the meaning of “new reliable studies” is unclear and this sentence does not have much instructive value.

[Paragraph 50]

The Government of Japan suggests deleting the entire paragraph.

The meaning of the expression in the first sentence, starting with “after an opportunity to resort to all judicial appeal procedures . . .” is unclear. In a constitutional State respecting the rule of law, when a sentence of the death penalty is finalized after careful hearing in a criminal trial (and appeal process), it is a matter of course that such sentence be carried out. While States Parties may incorporate some form of legal remedy, the structure and operation of such remedies shall be in accordance with the legal system of respective States Parties.

In addition, regarding the second sentence starting with “Furthermore, death sentences must not be carried out as long as . . .”, it should be noted that States are not bound by obligations unless that obligation is established under treaties that the State is a party to. Whereas the Covenant does not stipulate any obligations mentioned in the draft comment, the comment goes beyond the scope of the Covenant by altering/modifying the nature of the obligation and thus is inappropriate.

[Paragraph 51]

Regarding the first sentence, there are cases where convicted persons make repeated application for pardons and other remedies on the same grounds to avoid the death penalty. If the execution of the death penalty is barred in such cases, the death penalty may never be carried out, thus making it impossible to fulfil the purpose of criminal trials. For this reason, the Government of Japan considers the first sentence to be inappropriate. Therefore, the Government of Japan proposes deleting the word “conclusively”.

[Paragraph 52]

The Government of Japan proposes that the first sentence be replaced by *“Article 6, paragraph 5 prohibits imposing the death penalty for crimes committed by persons below eighteen years of age and carrying out the death penalty on pregnant women”* in accordance with the wording of the Covenant*.*

Unlike the age cap of 18 years old, pregnancy of the perpetrator bars only the execution of the death penalty but not the imposition of it based on the crimes committed by pregnant women. The current text does not distinguish the former from the latter and is misleading.

[Paragraph 53]

 Regarding the first sentence, the question of what type of penalty shall be imposed is one for the court to decide, taking into consideration the nature of the crime, any disabilities the offender may have as well as the seriousness of such disabilities. In a constitutional State respecting the rule of law, when a sentence of capital punishment is finalized after a careful hearing in a criminal trial (and appeal process), it is a matter of course that such sentence be carried out. The current draft comment risks inducing the misunderstanding that offenders with minor mental disabilities cannot be sentenced to capital punishment or that capital punishment may not be carried out against such offenders. Therefore, the Government of Japan suggests modifying the expression of the draft comment to avoid such misunderstanding. In addition, whereas the draft comment notes that capital punishment shall not be imposed “on persons with or without disability that have reduced moral culpability”, such circumstances cannot be regarded as grounds to avoid execution of capital punishment and therefore shall be deleted.

 Regarding the second sentence, the factors enumerated after “and persons whose execution would be exceptionally cruel” are factors to be considered during a trial, and when a sentence of capital punishment is made after taking such factors into consideration, there is no reason that capital punishment shall not be carried out. In addition, even if such factors arise after imposing a sentence of capital punishment, they cannot be a sufficient ground to avoid the execution of a sentence made after careful hearing in a criminal trial (and appeal process) and therefore shall be deleted.

[Paragraph 54]

The Government of Japan proposes deleting this paragraph entirely.

The Covenant respects the inherent right to life and at the same time allows the death penalty. Furthermore, the Government of Japan does not believe that article 6, paragraph 6 takes the position that “States parties that are not yet totally abolitionist should be on an irrevocable path towards complete abolition of the death penalty”.

[Paragraph 55]

The Government of Japan proposes deleting this paragraph entirely.

The Government of Japan does not regard the death penalty as “a cruel, inhuman or degrading punishment per se”. Nor do we believe that such a consensus has been formed in the international society.

[Paragraph 56]

The last sentence uses an inappropriate example. This sentence should be deleted or, if not deleted, the expression “not constituting the most serious crimes” should be inserted after “exercising freedom of expression”. The perpetrator of most serious crimes such as murder could be sentenced to capital punishment even if that conduct also constitutes an expression for the perpetrator. The last sentence of this Paragraph appears to ignore such cases and thus is misleading.

[Paragraph 58]

The Government of Japan opposes any ill-treatments. However, the Government of Japan must say that there is a huge leap in logic if a death penalty based on the information procured by any ill-treatment is immediately regarded as a violation of article 6. This is because “ill-treatment” is a broad concept and the level of illness among the treatments within this concept varies widely. Therefore, the Government of Japan requests the modification of the second sentence, such as replacing “would” by *“could”*.

[Paragraph 60]

Notifying the execution of inmates to their relatives in advance would cause unnecessary psychological suffering to the relatives. Also, if the inmates come to know the schedule of the execution through their relatives, inmates’ peace of mind may be negatively affected. Considering these concerns, the Government of Japan proposes deleting “of the date in which the carrying out of the death penalty is anticipated, and” in the second sentence.