A REPORT OF KOKUBAI NETWORK WITH REGARD TO THE FIFTH PERIODIC REPORT OF THE GOVERNMENT OF JAPAN SUBMITTED UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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KOKUBAI NEYWORK

(Support Network for State Redress Lawsuits in Japan)

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Introduction

1. In accordance with Article 40 of the International Covenant on Civil and Political Rights, the Fifth Periodic Report of the government of Japan was submitted in December 2006. The Support Network for State Redress Lawsuits in Japan (hereinafter referred to as "the SNSRL"), which is known as the Kokubai Network in Japanese, has prepared this document as an NGO's report to the government's report, and respectfully submits it here to the Human Rights Committee to provide full information about the real human rights situation in Japan for the Committee's fruitful consideration of the government's report.

2. The SNSRL would like to draw your attention to the two issues reported below as the Human Rights Committee reviews in its 94th session. One is the issue that evidence is not disclosed in criminal trials (related to Item 11 on the list of issues for discussion in the current session of your Committee meetings), which is related to Article 14 of the Covenant. The other is that no compensation is made to the victim of unlawful arrest or detention, which is related to the Covenant Article 9, paragraph 5.

3. The SNSRL is one of NGOs working for securing human rights in Japan. The network has been exchanging experiences and facilitating mutual assistance concerning lawsuits for damage compensation and apology under the State Redress Law concerning damage from unlawful execution of power by the state or local governments. After experiencing frequent occurrences of false accusation cases around 1971, plaintiffs of lawsuits demanding compensation/consolation money after acquittal established this network in 1989. For your reference, the State Redress Law was enacted in 1946 under Article 17 of the Constitution of Japan.

4. While preparing the Fifth Periodic Report of the government of Japan, the Ministry of Foreign Affairs approached some of such human rights NGOs for brief hearings. At that time, the SNSRL explained the two issues mentioned above. We have found, however, the Report does not reflect our observations. We would like to report on these issues and point out where the governmental report is inadequate. What we report in this document is just a small portion of the problems we see concerning the state of human rights in Japan. Nonetheless, they represent essential aspects of the matter that must not be overlooked in the effort toward the realization of fair trials and to improve the human rights situation in Japan.

1. The issue that no evidence is disclosed (related to Article 14)

1-1 The final view from the previous session and the Fifth Periodic Report

5. The Human Rights Committee examined the Fourth Periodic Report of the government submitted by the Japanese government in November 1998, and adopted the final view on the report at the meeting on November 5, 1998 . The view statement includes your recommendation on the issue of disclosure of evidence in criminal trials, as follows.

6. 26. The Committee is concerned that under the criminal law, there is no obligation on the prosecution to disclose evidence it may have gathered in the course of the investigation other than that which it intends to produce at the trial, and that the defence has no general right to ask for the disclosure of that material at any stage of the proceedings. The Committee recommends that, in accordance with the guarantees provided for in article 14, paragraph 3, of the Covenant, the State party ensure that its law and practice enable the defence to have access to all relevant material so as not to hamper the right of defence. (CCPR/C/79/Add.102, paragraph. 26)

7. Meanwhile, the Japanese government reported in the Fifth Periodic Report of the government in the section entitled "Article 14: Right to Fair Trial - 2. Disclosure of Evidence to the Defense Counsel" as follows.

8. 288. In cases where a public prosecutor intends to question witnesses, expert witnesses, interpreters or translators in court, that public prosecutor must give the defendant and the defense counsel an opportunity to know the names and addresses of those witnesses in advance. In cases where a public prosecutor intends to submit evidential documents or articles of evidence for examination in court, that public prosecutor must give the defendant and the defense counsel an opportunity to peruse them in advance of the court procedures. In addition to this, the court, based on its authority to preside over a lawsuit, can order disclosure of evidence possessed by the public prosecutor. Actually, the public prosecutor examines whether or not disclosure of evidence is necessary, and the timing and extent of such disclosure in light of the facts of the case and, when appropriate, discloses evidence deemed to be reasonably necessary for the defense of the defendant. If there is a difference of opinion between the public prosecutor and the defense counsel, the matter is to be decided by the court.

9. 289. In this way the opportunity for the defendant and the defense counsel to receive disclosure of the evidence necessary to prepare for trial is already guaranteed, but in May 2004 the Law for Partial Amendment of the Code of Criminal Procedure was approved, as a policy to enhance and speed up criminal trials by expanding the disclosure of evidence by the public prosecutor. The law aims to enable sufficient

consolidation of the points of contention, and to allow the defendant to make sufficient preparations for his/her defense by establishing pre-trial procedures to consolidate the points of contention and evidence for the case prior to the first trial date. Concerning evidence that the public prosecutor intends to submit for examination in court (hereafter to be referred to as “evidence submitted by the public prosecutor”), the amendment law states that in cases where a public prosecutor intends to question witnesses that public prosecutor must give the defendant and the defense counsel the opportunity to know the names and addresses of the witnesses, and the opportunity to peruse and make a copy of the written testimony of the witnesses, that makes their intended court testimony clear (in the case of the defendant, only the opportunity to peruse the written testimony. Same below). In cases where a public prosecutor intends to submit evidential documents or articles for evidence in court, that prosecutor must provide an opportunity to the defendant and the defense counsel to peruse and make copies of that evidence. The same is true for the evidence other than evidence submitted by the public prosecutor to the court, when it is deemed appropriate to be disclosed after weighing the necessity for disclosure and the harm caused by disclosure of evidence of a certain type important for determining the probative force of evidence already submitted by the public prosecutor, and evidence related to assertions made evident by the defendant and the defense counsel. Furthermore, if contention arises between the public prosecutor and the defense over the necessity for the disclosure of evidence, a neutral and fair court will arbitrate the matter.

10. 290. The investigation records of criminal cases include a multitude of documents gathered as a result of wide-ranging investigative activities. The records include not only documents that have no bearing on the points of contention of the case but also documents that could damage the privacy or reputation of the people involved and make it impossible to gain their cooperation in future investigations if such evidence were to be disclosed. For this reason, it is not appropriate to impose a general obligation on prosecutors to disclose evidence other than evidence they plan to submit in the trial or to grant a general right for disclosure of evidence to the defense.

11. Summing up, the Human Rights Committee has recommended that "the State party ensure that its law and practice enable the defence to have access to all relevant material so as not to hamper the right of defence" in its final view. In the face of your recommendation, however, the Fifth Periodic Report of the government states that the evidence shall only be disclosed should such disclosure be permitted in judgment/ruling of the court, and that they would not grant "general rights to disclosure of evidence to the defense."

1-2 Cases where non-disclosure of evidence has led to false or prolonged trials

12. As briefly outlined in the above section, we should examine to see if fair trials are possible under the present circumstances of criminal trials where disclosure of evidence to the defense is restricted. The next section considers this issue by examining actual lawsuits brought up by members of the SNSRL victimized in false accusation cases.

1-2-1 Killing of a policeman in a general strike in Okinawa

13. The incident of manslaughter of a policeman occurred in 1971 in a general strike in Okinawa in the midst of a demonstration as the policeman was deployed for the security purpose. The defendant, once charged for murder, was acquitted in a criminal trial in 1976 in the second instance of the trial, which ruling was finalized as such. This trial indicated that there was a serious problem concerning disclosure of evidence to the defendants and the defending attorneys by the prosecutor in the course of the investigation and the trial.

14. The evidence for the acquittal of the defendants was a 16 mm movie film that had been collected by the prosecutor during the prosecution procedure. Nevertheless, this film was not disclosed to the defense, and the defense counsel did not even know such film existed. A civilian named Mr. Y had shot this film at the site of the alleged killing. As the police confiscated the movie camera with the film installed on the day of the incident to keep it in official retain. They had the film developed and printed frame by frame. When these prints were submitted to court as evidence of some other incidents occurring at the same site involving alleged obstruction of public duties of policemen, assembling with offensive weapons, etc. This submission of the evidence enabled the defense counsel to be aware of the existence of the 16 mm movie film containing scenes at the site in question.

15. The defendant's attorney found out Mr. Y who had taken the film and had hearings from him. According to Mr. Y's account, he was shooting as part of production work of a documentary film that day when a policeman confiscated his camera with the film. He was shooting scenes where the defendants were trying to extinguish fire and rescue a fallen policeman. Mr. Y also told that the policeman did not question about the shooting of the scenes whatsoever.

This film was returned to Mr. Y about one and a half years after the incident. His attorney obtained the film and submitted it to the court as the evidence. This film was recognized as decisive evidence for the court to acknowledge that the defendant's act was not murder but fire-fighting and rescue action.

16. This case attracts our attention to the fact that the prosecutor possessed evidence in favor of the defendants (passive evidence) when preparing for legal action but concealed the fact that such film existed from the defense. Police and prosecutors monopolize evidence they colleted by exercising public authority, disabling the defendants and the defending attorneys to learn the existence of evidence if the evidence would not provide the ground of the prosecution. Please note that this is not anything peculiar to this case but a problem frequently experienced in trials at large.

1-2-2 Attempted bombing of the official residence of the Superintendent General

17. In 1971, there was an incident of an attempted bombing of the official house of the commissioner of the Tokyo Metropolitan Police, the core of the police organization, using a hand-made bomb. A patrolling policeman detected this hand-made bomb and explosion was prevented. Six suspects were arrested and prosecuted, who were eventually acquitted in a criminal trial after it was evidenced that none of them were involved in this incident. This ruling was finalized as such.

18. Where there is no evidence available for a serious crime, Japanese police often arrests suspects for minor offenses, detain them in a substitute prison and then coerce them into making a false admission. This technique is referred to as bekken taiho, meaning arrest on a charge of convenience. In the investigation into this incident, police arrested them on a charge of use of an automobile stolen 20 days earlier. Later in the court, a testimony proved that the statement of the eyewitness was make-believe. However, this arrest on a charge of convenience led to the creation of a false deposition for one of them that the person had made an admission of the crime. Using that false statement, those six were arrested. Four out of the six made an admission of the crime and the six people were prosecuted.

19. Such investigation procedure often involves false material among initial investigation information. The defendants continued to request the evidence hidden by the prosecutor to be disclosed. For example, the following documents were subject to the disclosure request:
(1) Evidence statement (a document showing the evidence that can justify the arrest of the defendants) attached to the request for arrest warrant,
(2) The investigation report developed by the head of the investigation (false reporting for linking the evidence and the suspects),
(3) A list of all evidence articles delivered from the police to the prosecutor (to check whether the prosecutor's judgment to bring an action against the suspects is legitimate or not),
(4) Investigation documents around the suspects created at the initial investigation

phase,
(5) The report created by the policeman who had failed to arrest the culprit(s) on the spot at the time of the incident, and
(6) Documents from investigation for proving assumptions related to the suspects' alibis among other things.

20. In the criminal trial, the depositions created while the defendants denied the allegation, which were hidden at first, were disclosed as well as the depositions associated with the processes through which 'admission' was generated, providing significant evidence indicating that the defendants were innocent. However, the court rejected a large number of disclosure requests for investigation documents.

21. For instance, we can consider the case of Defendant S for alibi-related investigation documents. He was questioned as the nominal owner of the passenger car allegedly used and discarded by a culprit. However, Defendant S was at the residence of Mr. and Mrs. N, his friends, until late at night on the day of the incident. He was among seven people mingling while dining and drinking until 1:30 a.m. As N's residence was a flat in an apartment house of not-so-closed wooden construction without air-conditioning, they had the window of the room opened on that very hot evening. The landlord downstairs and occupants on the second floor were well aware of this fact. Thus, Defendant S could not be involved in the incident and his alibi was proven. Three suspects of the bombing case were among the seven present at this gathering that night.

22. In the criminal trial concerned, the senior investigator admitted that alibi-proving investigation was carried out based on hearings from Defendant S. However, he gave testimony that he did not remember the result. Given that, the defending party strongly requested disclosure of the investigation documents with an assumption that the investigation documents should have evidenced the alibi of the defendants, but the court rejected their request for disclosure of the documents. While specific and detailed but false admission statements were forged later, this fact mentioned above indicates that there was an alibi that could prove the fallacy of such depositions from the initial stage of the investigation. It can be concluded that the persistent concealment of material concerning the alibi-proving investigation supports the alibi.

1-3 Request for disclosure of evidence for fair trials

23. The Fifth Report of the Government of Japan states, "it is not appropriate to impose a general obligation on prosecutors to disclose evidence other than evidence they plan to submit in the trial or to grant a general right for disclosure of evidence to

the defense." In this regard, it is problematic that the revised Code of Criminal Procedure grants an exclusive right to one of the parties concerned, that is the prosecutor, to determine on the issues of "necessities for disclosure" or "when deemed it necessary," as one of its provisions states, "When the public prosecutor deems it necessary according to the degree of necessity for the disclosure of evidence and the possible harmful effects of disclosure, an opportunity of reference and copying of the evidence shall be given."

24. As shown in the case in section 1-2-1, should the fact that any significant evidence exists be concealed by the prosecutor, there is not even room for argument concerning "necessities for disclosure." Furthermore, though the law provides, "Should any dispute arise over necessities for disclosure of evidence, a neutral and fair court shall give ruling." In case evidence itself is hidden, however, discussion over necessities for disclosure would become impossible. Injustice would be resulted as in such case as shown above. The right to defense on the part of the defendant could not be secured unless all articles of evidence collected by police and prosecutors were disclosed, or unless a list of all articles of evidence, active or passive, were presented to the defendant and the defense counsel.

25. For the case described in section 1-2-2, 11 years were consumed for a criminal trial (with the ruling of the first instance finalized), followed by 17 years of a state redress lawsuit (to practically lose in the third instance) described below. With the hidden evidence disclosed from the initial stage, the criminal trial would not have been possible from the beginning, and the state redress law would have seen the final ruling quickly.

26. Currently in Japan, criminal cases are tried under circumstances where police and public prosecutors retain all evidence articles collected through compulsory investigation to themselves or discard them at their will. Such articles are adopted/dropped so as to prove guilty. Evidence continues to be hidden even after a retrial or state redress lawsuit has begun in an effort to reduce the responsibility of police and prosecutors as mush as possible. Evidence has been concealed in each criminal trial and state redress lawsuit. As a result, the responsibility of police/prosecutors has become blurred, leading to unjust criminal trials occurring one after another. We must say that the fact the guilty rate exceeds 99.9% indicates injustice in criminal trials.

27. As described above, disclosure of evidence for ensuring fair trial is not sufficiently performed in Japan, which state is in violation of Article 14 of the Covenant.

2. The issue of absence of compensation to the illegally detained

2-1 The Third Periodic Report of the government concerning compensation to the illegally detained.

28. The Third Periodic Report of the government states as follows in the section on Article 9, paragraph 138-140 :

29. 138. Regarding article 9, paragraph 5, of the Covenant, article 17 of the Constitution provides that "Every person may sue for redress as provided for by law from the State or a public entity, in case he has suffered damage through illegal act of any public official", and the State Redress Law was enacted according to this provision. In its article 1, paragraph 1, the State Redress Law provides that "If a public official authorized to exercise the power of the State or of a local public entity has inflicted, intentionally or through negligence, any damage on any person through an illegal act, in the conduct of his official duties, the State or the local public entity concerned shall be under obligation to make compensation for it." Any person who is unlawfully arrested or detained by the intention or negligence of a public official in charge of the exercise of public power in the performance of his duty may demand compensation for damage from the State or a public entity in
accordance with the provision.

30. 139. Even in a case where the arrest or detention is not illegal, article 40 of the Constitution provides that "Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law." Thus, the range of compensation has been expanded. In line with this provision the Criminal Compensation Law was enacted. The Law establishes compensation for damage caused by arrest or detention pending trial (Article 1, paragraph. 1) and for damage caused by execution of penalty and confinement (Article 1, paragraph. 2) for a crime of which the person concerned has been acquitted. The amount of compensation to be paid shall be determined by the court within the limits determined by the law (Article 4).

31. 140. Also, as mentioned in the second periodic report, in the light of the seriousness of the economic, physical and mental disadvantages that an innocent person suffers as a result of arrest or detention even though he is not ultimately indicted, it is considered to meet the purport of article 40 of the Constitution and to agree with the idea of justice and equality that such person is compensated for his damage. It is for that reason that the Regulations for Suspect's Compensation (Instructions No. 1 of the

Ministry of Justice dated 12 April 1957) were established. According to these regulations, compensation for damage caused by arrest or detention shall be made to the person who has not been prosecuted if there is a sufficient ground to recognize that he has not committed the crime. (CCPR/C/70/Add.1, paragraph. 138-140)

32. Thus, the Japanese government has been reporting consistently in its Second and Third Reports that article 9-5 has been complied with. Furthermore, there is no reference to this issue in the Fourth or Fifth Report because of the fact that no comments were made in your reviewing of the Second and Third Reports.

2-2 Current situations where compensation is hardly given to victims of false accusation cases through state redress lawsuits

33. As for Article 9, paragraph 5, of the Covenant, "compensation to the victim of unlawful arrest or detention," in fact, there are a number of problems as below even though Japan has the State Redress Law and the Criminal Compensation Law, resulting in extremely inadequate provision of compensation.

34. First of all, should a prosecuted defendant be acquitted and the ruling be finalized, it is true that the government pays compensation according to the length of days detained under the Criminal Compensation Law. However, the amount payable is no more than ¥12,500 (Article 4, paragraph 1 of the Criminal Compensation Law) per day, which is equivalent to only 63% of the average daily wage of ¥19,520 in 2005 (source: 2007 Japan Statistical Yearbook) for the entire working population of Japan. Thus, this level of compensation cannot be recognized as sufficient relative to damage and mental pain experienced by defendants.

35. Second, while there are cases where compensation is given to an arrested and detained defendant if they are not prosecuted according to the provision for compensation to the suspect, as stated in the Third Periodic Report of the government, compensation under this provision is left to the judgment of the prosecutor. This means that the suspect is not allowed to companion complain? if the prosecutor has judged that no compensation be made.

36. Moreover, neither the Criminal Compensation Law nor the provision for compensation to the suspect includes apology to the erroneously detained or measures for sufficiently recovering the dishonored social reputation of that person. Summing up, the compensation system is inadequate either for the accused or the suspected.

37. Third, for detention not related to criminal procedures (such as detention under

immigration control or due to mental disorder, etc.), there is no way to receive compensation except for compensation under the State Redress Law described below even if the detention is later found to be unlawful.

38. Should a person be placed under unlawful detention for any reason mentioned above, he/she needs to make request to the government for compensation under the State Redress Law in order to receive sufficient compensation. As it is very unlikely for the government to voluntarily accept such request for compensation, a legal action cannot be avoided to make such compensation implemented. However, a state redress lawsuit is subject to the following problems:

39. First, in order for any person to be allowed to make request for compensation after acquittal in a criminal trial, that person must prove that the accusation by the prosecutor was illegal. In this case, the Supreme Court ruling dated June 29 1989 (given in the case of an alleged killing of a policeman in a general strike in Okinawa referred to in section 1-2-1) judged, "The act to bring the case to the court should not be deemed as unlawful should the person be suspected guilty in a reasonable judging process based on comprehensive considerations of evidence documents." The same rational is often adopted in rulings for other state redress lawsuits. However, the fact the not-guilty ruling has been finalized decisively indicates that the accusation by the public prosecutor has been a mistake. Therefore, unless there is enough evidence for the state to rebut the ruling and support the legality of the accusation, the accusation should be judged as a mistake. The decision of the Supreme Court above constitutes a serious obstacle against the realization of compensation for unlawful detention. Also note that similar problems occur when requesting compensation for unlawful arrest by policemen.

40. Second, according to the interpretation of the Supreme Court, "evidence documents" referred to in this context are limited to those already collected or those that could be collected by the public prosecutor at the time of accusation. However, among materials in possession of the prosecutor, those actually available for the ex-defendant or ex-suspect (a defendant of a state redress lawsuit) are limited to those disclosed in the relevant criminal procedure. (They are mostly submitted as evidence that might prove the defendant was guilty. We should remember that, in a criminal lawsuit in Japan, the prosecutor is not liable to disclose all evidence in his/her possession, which practice itself violates Article 14, paragraph 1 of the Covenant.) The situation is as such because there is no other system for disclosure of evidence in possession of the prosecutor for state redress lawsuits as well. Therefore, it is difficult for the plaintiff to collect adequate evidence to prove that the prosecutor's accusation was unlawful.

41. In the case of the attempted bombing of the official house of the commissioner of the Tokyo Metropolitan Police discussed in section 1-2-2, the appeal that the accusation was unlawful was rejected while not even a list of evidence articles possessed by the prosecutor was disclosed. Under the circumstance, the liability of the state (the prosecutor) was not recognized at all. In this action, the only illegality admitted was the act of two policemen to obtain false deposition in the course of investigation by the police (the Tokyo metropolitan authority). Those policemen took advantage of the suspects to carry out investigation while giving guarantee for charging them with misdemeanor. Thus, the court ordered the Tokyo metropolitan government to pay compensation of a total of three million yen to the six ex-defendants suspects (with additional four million yen for late payment as the payment was made about 30 years after the occurrence of the unlawful incident). In this ruling, the assessment of the damage was up to discretion of the judiciary and the ground for the calculation of the compensation was not clarified at all.

42. In fact, in the 16 years from 1985 to 2001, only six rulings ordered the state to pay compensation in cases of unlawful detention. There has been no case where the Supreme Court has ordered the state to make compensation. In one case, it cancelled the liability of the state for compensation established in a lower court.

2-3 Realize compensation to those detained unlawfully, and eliminate hostage-leveraged justice

43. Due to the inadequacy of the criminal procedure exposed in frequent uses of substitute prisons and restriction of audience of the detained by lawyers as well as easy-going dependence on confession by the court, we have not succeeded in eradicating false accusations in Japan. As described above, the State Redress Law is hardly functioning for unlawful detention in the criminal procedure, which means that policemen or prosecutors would not be held responsible for unlawful arrest or prosecution. This is one factor in the background of unceasing false accusation cases.

44. Additionally, state redress lawsuits proceed according to the civil lawsuit procedure. Individuals have every disadvantage against the state (the prosecutor) that monopolizes evidence. The procedure of disclosing documents concerning criminal cases established in the 2004 revision of the Civil Lawsuit Law does not guarantee access to all evidence by the defending party. The prosecutor is not even required to disclose a list of all evidence articles.

45. Contrary to the Third Periodic Report of the Government submitted by the Japanese government, hardly any compensation is made to victims of unlawful

detainees. With this situation in the background, cases of prolonged detention and coerced confession continue as ever. This problem is sometimes referred to as " hostage-leveraged justice ". The term "hostage-leveraged justice" represents how the Japanese justice system functions by detaining suspects and defendants who refuse admission over a prolonged period of time. Hostage-leveraged justice is a significant factor behind unfair criminal trials.

46. As stated in this counter-report, compensation for unlawful detention is not sufficiently made, bringing about unfair trials. Such situation is in violation of Article 9, paragraph 5, and Article 14, paragraphs 1 and 6 of the Covenant.

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