

# Whaling on Trial

Japan's whale meat scandal and the trial of the Tokyo Two



GREENPEACE

Whaling on trial

# Whaling on Trial

## Japan's stolen whale meat scandal and the trial of the Tokyo Two

In early 2010, two Greenpeace activists will go on trial in Japan in an unprecedented court case - one that court papers will register simply as a case of theft and trespass but which, over the course of the past two years, has become so much more. Corrupt government practices, Japan's adherence to international law, freedom of speech and the right of individual protest and the commercial killing of thousands of whales are all under the spotlight. Before the verdict has even been rendered, the United Nations has already ruled that, in the defendants' attempts to expose a scandal in the public interest, their human rights have been breached by the Japanese government.

'*Whaling on Trial*' outlines the key elements of Greenpeace's investigation of the Japanese government-sponsored whaling programme and the subsequent arrest, detention and prosecution of Junichi Sato and Toru Suzuki.

For more than 20 years the Japanese government has sponsored a lethal whaling programme in the Southern Ocean Whale Sanctuary under the pretext of scientific research, following a moratorium on commercial whaling by the International Whaling Commission. Repeated requests by the Commission to end the programme - widely condemned internationally as nothing more than commercial whaling by stealth - fall on deaf ears, as successive governments in Tokyo insist that the programme is legitimate.

In January 2008, Greenpeace Japan's Junichi Sato was tipped off by a former whaler that the so-called research was far from legitimate and was in fact, from deckhands to government officials overseeing the programme, riddled with corruption.

The story was sufficiently credible and backed by testimony from at least two other whalers, so Sato, together with Toru Suzuki, decided to investigate further. Using standard research and corroboration techniques employed by investigative journalists the world over and protected under the International Covenant on Civil and Political Rights, they secured the evidence that substantiated the claims, proving that whale meat had been illegally shipped from the expedition for personal gain and with the full knowledge of government officials.

Initially, the claims seemed to be taken seriously and the Tokyo district prosecutor began his own investigation. However, Greenpeace's allegations had struck deep into the heart of the establishment and, one month later, this investigation was shut down without explanation on the same day that Sato and Suzuki were arrested.

Japan's subsequent treatment of the 'Tokyo Two' is a catalogue of failures - which have been specifically and formally condemned by the UN Human Rights Council's Working Group on Arbitrary Detention - to adhere to international law and agreements to which it has given its name and endorsement, as well as its own domestic laws. Police tip-offs to media prior to the arrest, detention without charge for 23 days, questioning without a lawyer present and while being tied to a chair, censorship of basic information requested through Freedom of Information requests and a blanket refusal to disclose documents that would aid their defence are just some of the notable failings.

Cast as a straightforward criminal trial, the case nevertheless bears all the hallmarks of a political prosecution. It will be heard in the northern town of Aomori, but the lead judge has been brought in especially from Tokyo. It will put on trial not only whaling but also wider government policies, raising fundamental questions about their legitimacy.

It is not common knowledge inside Japan that the government spent a billion yen of taxpayers' money on whaling in the previous year, nor that most whale meat is stockpiled in freezers because the appetite for it is so low. The cash-flow between the government, the Institute for Cetacean Research - which sponsors the 'science' - and Kyodo Senpaku - which runs the ships - is very murky; attempts to clarify how money is spent and by whom are met with blacked-out documents and denial. The ancient system of 'Amakudari' - dropping bureaucrats by 'golden parachute' into well-paid retirement jobs in government agencies is also intentionally lacking in transparency. And yet, all of these factors ensure that subsidisation of a programme that is not needed, not wanted and not scientifically robust continues.

It is all these scandals that Greenpeace aims to expose in this trial, as well as the original allegations. Sato and Suzuki know that they risk up to 10 years in jail; they also know that to say or do nothing risks much more.



Junichi Sato  
Greenpeace Japan  
Campaigns Director

Long-time activist Junichi Sato has worked for Greenpeace since 2001. Formerly working on the Toxics Campaign, Junichi was the force behind bringing the 'Zero Waste' policy introduced in countries such as Australia, New Zealand and UK, to Japan. He led the Oceans team on issues such as overfishing, illegal fishing, the Okinawa dugong and whaling.



Toru Suzuki  
Greenpeace Japan  
Policy Advisor

42-year-old Suzuki spent many years as a professional motorcycle racer, competing domestically in Japan and internationally, most notably in Australia. After 9 months as a volunteer, he joined Greenpeace in late 2007 as actions coordinator, swiftly becoming an integral part of the investigation that would expose the whale meat embezzlement scandal.

# Allegations: the whaler's story

Greenpeace has been campaigning with the International Whaling Commission (IWC) against commercial whaling for more than 30 years. In 1987, the same year that a moratorium on commercial whaling came into effect for Japan, the Japanese government created and funded the Institute for Cetacean Research (ICR), with the sole purpose of continuing to hunt whales, but for 'science' and not commerce. This so-called research programme became the focus of many Greenpeace campaigns and actions. While the exposure has brought significant international pressure upon the government of Japan, it has also alienated Greenpeace in Japan. It is, therefore, testament to how disillusioned one whaler had become that he chose to turn to the very organisation that had confronted his ships in the frigid waters of the Southern Ocean Whale Sanctuary...

It was a simple matter of honour that prompted a long-time whaler to call Greenpeace in Tokyo and talk about what he saw as corruption and deceit within the Japanese government whaling fleet.

Wishing to remain anonymous for fear of retribution, the middle-aged man explained how proud he was to be involved in whaling, seeing nothing wrong in principle with either commercial or lethal research whaling.

The whaler had believed the Institute's claim that the whales needed to be killed in order to carry out the scientific research. But increasingly he saw inconsistencies with the research that led him to conclude it was simply a charade. What he witnessed was not science as the government claimed it to be, and he believed it was wrong to lie to the taxpayers who fund the annual expedition.

Chief among his concerns were the following:

- **Embezzlement**

Prime cuts were taken home by crew members to be kept or sold, rather than being sold through the government agencies in order to refund tax subsidies.

- **Waste**

Up to seven tonnes of meat a day – usually the cheap cuts – was simply thrown overboard, rather than processed.

- **Non-scientific**

Rather than taken randomly, as required by the research parameters, whales were targeted - suggesting they were being chosen for profit margin potential, not scientific study.

- **Disease**

Some whales showed signs of tumours and lesions. Although the ICR took samples and documented the disease, no reports were made back to the IWC.

The whaler's allegations were extensive and precise. They formed the basis of the Greenpeace investigation.



**image** Transfer of whales and the flensing of whales continues aboard the deck of the *Nisshin Maru* factory ship of the whaling fleet of Japan. Greenpeace is using every available means to bring the whaling hunt to an early end and make it the last time the Sanctuary is breached by the whalers.

© GREENPEACE / JEREMY SUTTON-HIBBERT

# Allegations: the whaler's story

## Embezzlement

According to the whaler, the embezzlement of the meat was conducted with the full knowledge of the onboard officials from the ICR and the government's Fisheries Agency. Indeed, the informant claimed that extra meat was often boxed up for government officials ashore. Precise details of how the embezzlement operation was carried out were given; the crew usually took 'unesu' – prime cuts taken from the throat of the whale - preserving them in salt in their cabins rather than freezing them with the remaining stock. The meat was then transported in boxes of personal belongings, which were always collected by the same courier company. When Greenpeace investigators documented the return of the whaling fleet in 2008, the process played out precisely as the informant had described it.

## Waste

The whaler, who had spent years working on the Japanese whaling ships, knew full well the whale-processing capacity of the *Nisshin Maru's* crew. Although the scientific rationale for doing so was unclear, in 2005 the government of Japan increased the number of whales to be targeted in the Southern Ocean Whale Sanctuary to over double the previous year. According to the whaler, the crew simply couldn't process the number of whales caught under the new programme and consequently tonnes of meat were thrown overboard every day to clear the decks for the next kill. He was not the only crewman angered by the waste. Additionally, there was no apparent scientific imperative in choosing what to dump and what to keep, and the meat that was kept was the most commercially viable.

## Non-scientific

According to the parameters of its own research plans, known as JARPA and JARPA II, the whaling fleet should have been randomly 'sampling' the whales. According to the Greenpeace informant, the reality was the opposite. The research programme divided up the Southern Ocean Sanctuary into sections, and the euphemistically-named 'sampling' was to be taken randomly over the whole region. However, the standard practice was to take the whales whenever they encountered them – the main concern being to reach the number required, not to examine specimens from across the region.

## Disease

The data gathered from decades of 'research' whaling is rarely peer-reviewed. Normally, scientific programmes relating to whales are reported to the Science Committee of the IWC. Rarely is anything more than the most basic detail of the JARPA programmes presented to the Committee. There have never been any reports relating to health concerns regarding the whales of the Southern Ocean, yet the whaler claimed that there were numerous examples of suspicious-looking tumours and lesions found on the whales. ICR personnel photographed some, others were simply cut out and the remaining meat processed as normal for human consumption. After scandals in Japan about levels of mercury and other toxins in whale and dolphin meat from around the coasts of Japan, Southern Ocean whale meat is marketed as the cleanest meat available. Clearly, that could no longer be claimed if there were concerns about the health of these whale stocks. Without independent verification, it remains unclear whether the tumours and lesions are of concern.



**image** The Japanese whaling fleet returns to port. Greenpeace is calling for the whaling fleet to be permanently decommissioned.

# The Greenpeace investigation

## Basing the investigation on the standard rules of investigative journalism – corroboration, eye-witness testimony and physical evidence, the Greenpeace investigators set out to substantiate the whaler's claims...

Following the interview with the primary informant, Greenpeace received the same claims from two other whalers, one still sailing and one retired, which confirmed what the original informer had claimed - particularly in relation to the embezzlement allegations. They also confirmed that the practice had been going on for years.

Unable to obtain physical evidence for three of the main allegations, the investigators decided to focus on the embezzlement claims. According to regulations on the sale of whale meat in Japan, the government sets the prices and makes new meat available for public sale only after the annual IWC meeting, which takes place in June or July. Anything on sale before that is either from a previous season or is being sold illegally.

A series of interviews with local traders in bars and markets in nine different locations across Japan in February and March 2008 confirmed that they were expecting supplies of whale meat as soon as the whaling fleet returned in April. Others acknowledged that the theft was planned in advance, one even joking that supplies of curing salt had run out before the fleet had even departed.

On 15 April 2008, the *Nisshin Maru* - factory ship of the fleet - docked at Oi fisheries pier in Tokyo Harbour. Just as the informant had described, trucks from the Seino Transport courier company were waiting on the wharf to load baggage. Approximately 90 boxes, apparently 'personal-use' baggage, were offloaded. The Greenpeace investigation team followed the Seino Transport truck overland.

Investigation at the Seino Transport depot established that more than 23 crew members sent at least 93 boxes to at least 30 destinations. Labels on the boxes were checked and documented; most claimed to contain cardboard, black plastic, salted stuff, although the weight of the boxes made it clear that the contents were far heavier than the contents of the label would suggest.

Greenpeace obtained copies of Kyodo Senpaku employee registers to confirm that boxes were being sent to employees. Of the 23 names and addresses noted, 12 names and addresses matched the personal details on the employee registers. All were listed as 'production workers'. In addition, one of the 12 production workers sent boxes to an ex-production head, an ex-production assistant head and an ex-production worker, all of whom had been named by the informant as being involved in the same operation while they were employed by Kyodo Senpaku. The fact that they were still receiving boxes from current employees suggested continued involvement in the theft of meat. All 47 boxes sent by the 12 production workers were due to be shipped to Hokkaido, Aomori, Nagasaki, Akita, Miyagi and Yamaguchi prefectures.

Following delivery of the boxes to the depot, on 15 April 2008 Greenpeace investigators followed two different consignments to depots in Aomori prefecture and Fukuoka prefecture respectively. At the Aomori depot on 16 April, boxes labelled as containing 'cardboard' were weighed, and were considerably heavier than if they had contained cardboard only. Four boxes were due for delivery to the home address of one of the 'production workers' listed on the Kyodo Senpaku personnel register. Toru Suzuki, one of the Greenpeace investigators, removed one of the boxes in order to verify its contents.



**image** Junichi Sato weighing 23.5kgs of whale meat found in a personal box of a *Nisshin Maru* crew member. The consignment sheet claimed the box contained 'cardboard'.

# The Greenpeace investigation

The 'cardboard' was, in fact, 10 pieces of *unesu* whale meat, weighing 23.5 kilos, cured in salt and hidden in plastic bags under working clothes - exactly as the informant had predicted. It was intended that the box be returned after documentation of its contents had been completed. However, Toru and fellow investigator Junichi Sato agreed that it should be handed in to the authorities because it was both compelling evidence of a crime, and the lawful property of the state, not its alleged 'owner'.

Having established at least two sources to corroborate the allegations, substantiated it further with additional information and finally secured the physical evidence, the Greenpeace investigators then approached government officials in an attempt to rule out any other explanation as to why meat was going to private houses and not government stores. Were employees, for example, given free whale meat as a perk of the job? The informant had warned that the authorities might try to pass off the meat being taken home by the crew members as small-scale 'souvenirs', traditionally given to fishermen returning from long voyages.

## What followed was a series of denials, admissions and confusion.

On 8 May 2008, Junichi called Mr. Takahide Naruko, the Fisheries Agency of Japan's chief of Far Seas Fisheries, to investigate whether or not the agency knew that crew members were taking whale meat as 'souvenirs'. Mr. Naruko dismissed the suggestion outright. A similar response came from the same enquiry to representatives of the whaling fleet, Kyodo Senpaku.

On 15 May 2008, Sato went public with the allegations, based on the original informant's claims, noting the official denial that whale meat was given as souvenirs or rewards. On the same day a criminal complaint was filed with the Tokyo Prosecutor's office, and the evidence gathered during the investigation was handed over. In the following days the official line changed, with both the ICR and the Fisheries Agency admitting that 'souvenirs' were given to crew, and that even the governmental Fisheries Enforcement Officer - onboard to verify the validity of the scientific programme - was similarly 'rewarded'.

With the scandal splashed across newspapers across the country, the ICR, the Fisheries Agency and Kyodo Senpaku began to offer yet another, but now joint, explanation for the whale meat. They claimed that Kyodo Senpaku had bought the whale meat from the Institute for Cetacean Research in order to give a 10kg 'souvenir' to each crew member, and that this had been the case since the programme started in 1987.

After defending the practice, the ICR later announced a ban on its researchers from receiving the souvenirs.

Five days after the scandal was exposed, the Tokyo District Prosecutor accepted that there was a case to investigate and began an inquiry into the Greenpeace allegations.

Until this point there was nothing exceptional about the investigation, nor indeed the confused official response. It was a standard investigation into misuse of public funds and a standard response from organisations caught by surprise. What transpired over the subsequent weeks and months has become a matter of deep concern to civil liberties groups, politicians, international lawyers and environmentalists alike.



**image** Greenpeace Japan Executive Director Jun Hoshikawa and Junichi Sato arrive at the Public Prosecutor's office in Tokyo to file a complaint and hand in a box of whale meat obtained as evidence of large-scale theft of whale meat from the government-sponsored Southern Ocean whaling programme.

© GREENPEACE / NAOMI TOYODA

# The backlash commences

**The Japanese government is fiercely defensive of its research whaling programme, which it views as an expression of Japanese tradition and a legal venture under international law.**

*“The research whaling which our country is doing is a lawful activity carried out on the high seas under the International Convention for the Regulation of Whaling.”*

**Prime Minister Yasuo Fukuda House of Councillors - plenary session 23 January 2008**

Critics of the programme, such as international environmental organisations, are often portrayed as being motivated not by concern about the preservation of species or the upholding of the international ban on commercial whaling, but by a Western cultural bias against killing of impressive and intelligent mammals.

When Junichi Sato presented the findings of the investigation into embezzlement, the media initially reported the claims in a factual manner, and the official response was muted. Criticism of research whaling usually came from abroad, not from domestic sources.

Before long, however, a sense of indignation took hold in some quarters against the investigators who had assailed this object of national pride. The media began to question the way in which the investigation had been conducted, focusing on the fact that a box of whale meat had been taken from a mail depot. Greenpeace Japan received a large volume of hate mail and had to put security measures in place. The attention of the police, too, started to turn away from the embezzlement scandal, towards the people who had brought it to light.

On 20 June 2008, just under a month after the complaint was filed, the Tokyo District Public Prosecutor’s Office dropped its investigation into the whale meat embezzlement, without bringing any charges. No reason was disclosed for the decision.

On the evening beforehand, Junichi Satu and Toru Suzuki – the key members of the team of Greenpeace investigators – learned from news reports on television that they were to be arrested the following day...



**image** Boxes of official whale meat being unloaded from the *Nisshin Maru*. These are to be sold to recoup the cost of the whaling programme.

© GREENPEACE / HIROTO KIRYUU

# The backlash commences

## The internal 'investigation'

The internal investigation by the ICR and Kyodo Senpaku - requested by the Minister of Agriculture, Forestry and Fisheries - concluded on 18 July. The final report covered less than a page in translation and contained no supporting evidence, and reiterated the claim that Kyodo Senpaku officially purchases a volume of whale meat from the ICR each year to be distributed to staff members as souvenirs of the hunt upon return to port.

The report claimed that each crew member received 8kg of salted *unesu* and 1.6kg of chopped red meat, that no crew member had sold his souvenir to a restaurant or retailer, and that there was no inconsistency between the production statistics for *unesu* and the amount carried off the ship. In short, it claimed that there was no evidence for embezzlement by crew members.

This explanation throws up a number of obvious questions – such as why the box of whale meat seized by the Greenpeace investigators contained over 23kg of *unesu* and *no* red meat, and how it was possible for Kyodo Senpaku to purchase whale meat *before* the whaling fleet's return to port - around mid-April - when the government only sets the year's official price for whale meat several months later, after the annual IWC meeting, which convenes in June or July.

The report explained that the box taken by Greenpeace contained not only the *unesu* given to the production worker who sent it to his home, but also the souvenir meat of a number of his colleagues. Furthermore, it claimed that Kyodo Senpaku had purchased the whale meat from the ICR at the previous year's official rate. To forestall the criticism that this amounted to an unauthorised discount, the report promised that - in future - the price would be adjusted once the official rate had been set.

Upon submitting the report to the government, the ICR issued a press release entitled 'Seafarers Cleared of Whale Meat Claims', claiming that there was 'not a shred of evidence to support any of the Greenpeace claims', and accusing the organisation of allowing its judgement to be clouded by zealotry. The responsible minister accepted the report and announced no further measures.



**image** Greenpeace witnessed the killing of whales in the Southern Ocean by the *Yushin Maru* and the *Kyo Maru* No. 1 ships of the Japanese whaling fleet, and the transfer of the whales to the *Nisshin Maru* factory ship. Signs on the whaling ship read "Greenpeace Misleads the Public!" and Science-Based Lethal Research.

© GREENPEACE / JEREMY SUTTON-HIBBERT



# The arrest of the 'Tokyo Two'

On the evening of 19 June 2008 – the day before the Tokyo Prosecutor dropped his investigation into the whale meat scandal – Junichi Sato and Toru Suzuki learned from news reports on television that they would be arrested the next day.

The two had previously offered to make themselves available to police at any time to answer questions about the Greenpeace investigation. They had also provided voluntary depositions, explaining in detail how and why they had secured the box of whale meat. Nevertheless, the next morning, a sizeable police force staged dramatic-looking arrests in the full glare of the media, which had been tipped off in advance...

The 'Tokyo Two', as they quickly became known, were taken to the northern port city of Aomori and detained in a police-run jail. Meanwhile, about 40 police officers conducted a 10 hour search at the Greenpeace Japan offices, seizing boxes of documents and computers, including the office server. The homes of four Greenpeace staff members were also raided. In total, about 75 police officers were involved in the operation.

Sato and Suzuki were held in pre-charge detention for 23 days, the maximum period allowable under Japanese law, and questioned daily. On 11 July they were finally charged with trespass on the Aomori branch office of Seino Transportation, and theft of 23.1 kg of whale meat valued at ¥58,905 (approximately \$550 US dollars at the time). These charges carry maximum penalties of 3 years' and 10 years' imprisonment, respectively.

Once the charges were announced, the Aomori District Court granted Sato and Suzuki bail pending their trial. Although the conditions of the bail were very strict – the defendants were prohibited from speaking to each other or with any other Greenpeace staff member, except through their lawyers – the prosecutor vigorously opposed the bail. He filed two appeals, arguing that Sato and Suzuki might use their freedom to destroy evidence, even though neither had at any point denied his role in obtaining the box of whale meat. The appeals were dismissed and Sato and Suzuki were set free on 15 July, although they remained unable to return to work until their bail conditions were relaxed somewhat eight months later.



**image** The Japanese whaling fleet unloads whale meat boxes in the port of Kanazawa, Japan. Greenpeace is calling for the whaling fleet, which is carrying nearly 1,000 dead whales from the Southern Ocean Whale Sanctuary, to be permanently decommissioned.

© GREENPEACE / MASAYA NODA

# The arrest of the 'Tokyo Two'

## Defence lawyers targeted

After their arrest, Sato and Suzuki were vilified in the media. Images of them being bundled into police cars like mafia kingpins were shown repeatedly on television. The public backlash against Greenpeace generated by the reports was such that even representing Sato and Suzuki became risky business.

At a press conference on the day of the arrests, the defence lawyers assigned to the case stated that, in their view, the acts of Sato and Suzuki did not constitute any criminal offence. A member of the public, reading a newspaper report on the press conference, wrote to the Tokyo Bar Association, complaining that it was unethical for a lawyer to defend a criminal act in this manner. Remarkably, the Bar Association proceeded to open an investigation, questioning two members of the defence team in some detail about their relations with Greenpeace, and the extent to which they had known in advance about the investigation into the embezzlement. Ultimately, however, the complaint was dismissed as unfounded.

## The Tokyo metropolitan government moves against Greenpeace Japan

Japanese criminal law does not allow legal entities to be charged with an offence, so it would not have been possible to charge Greenpeace Japan alongside Sato and Suzuki. However, under the *Law to Promote Specified Non-profit Activities*, non-profit organisations (NPOs) in Japan are subject to administrative oversight by the government. The responsible agency is the local government in the prefecture where the NPO is located; in Greenpeace Japan's case, this means the Tokyo Metropolitan Government (TMG).

Four days after the arrests, on 24 June 2008, the TMG opened an investigation into Greenpeace Japan, issuing an 'Order to Report on Business Activities'. The Order noted that two Greenpeace Japan employees had been arrested on suspicion of trespass and theft, and demanded clarification on whether the box of whale meat had been taken as part of an activity of the organisation. The TMG also ordered Greenpeace Japan to provide copies of a range of documentation, such as employment contracts and salary slips for Sato and Suzuki.

Further Orders followed on 9 September and 27 November. The TMG claimed it had received a substantial volume of enquiries from members of the public who were concerned by Greenpeace Japan's activities, and requested the organisation to publish its responses online in order to address some of these concerns.

The three Orders, viewed in the light of the authorities' overall handling of the case, leave little doubt about the TMG's intention to take concrete action against Greenpeace Japan, in the event that Sato and Suzuki are found guilty by the Aomori District Court. According to the *Law to Promote Specified Non-profit Activities*, the TMG could impose two types of sanctions: it might issue an 'Order to Improve' requiring Greenpeace Japan to take certain action within a specified timeframe, or face dissolution; or it could move to immediately disband the organisation.



**image** Greenpeace activists met the whaling factory ship *Nisshin Maru* with a banner saying 'Failed', when it arrived in Tokyo to unload whale meat. The ship failed to meet its quota of 935 whales by nearly half, in part because the Greenpeace ship *Esperanza* stopped the entire whaling operation for 15 days as it chased the *Nisshin Maru* across the Southern Ocean, over a distance of 4300 miles.

©GREENPEACE/NAOMI TOKYODA

# Harsh justice

Outwardly, Japan's criminal justice system resembles that of other modern democracies – there are ostensibly independent courts and prosecutors, a criminal code based (like many others around the world) on a French model, and a constitution which guarantees basic human rights, such as the right to a fair trial. But this façade, as Sato and Suzuki have discovered, hides a system in which the presumption of innocence accounts for little, and prosecutors appear more concerned with obtaining convictions than ascertaining the truth.

A person arrested in Japan on suspicion of a criminal offence can be detained for 72 hours before being either charged or released for lack of evidence. This is similar to other democracies, where the police often have 24 or 48 hours to question a suspect. Japanese prosecutors, however, are able to apply to a judge to extend the pre-charge detention twice - by 10 days each time - and such requests are rarely denied.

The result is that suspects are routinely questioned for the maximum 23 days in police-run substitute prisons (*daiyō kangoku*), as happened in Sato and Suzuki's case. The two Greenpeace defendants were questioned for up to eight hours daily, bound to a chair, without their lawyers present, and without the interrogation recorded – all standard practice in Japan. They recall that much of the questioning on the first three days was about issues entirely irrelevant to the case – their families, their interests, and so on. Subsequently, the prosecutor went before the judge, claiming that more time was needed for the interrogation.

A short pre-charge detention is important for a number of reasons. The suspect is presumed innocent, and may in fact have done nothing wrong. Prolonged questioning by the police is often not productive, and may pressure the suspect into making a false confession. Moreover, the police are supposed to have substantial evidence against the suspect before making the arrest in the first place.

With such long pre-charge detention, perhaps it is not surprising that Japan has an extremely high confession rate – 91.2% in 2004, the last year for which the Supreme Court has published figures.<sup>1</sup>

Defendants who do plead innocent find the odds heavily stacked against them. Although the courts are formally independent, in practice they show a great deal of deference to the prosecution. The defence is often not granted full access to relevant files held by the prosecutor, and is severely constrained in the witnesses it can call. Acquittals are a great rarity in Japan. In 2004, out of 13,698 cases at the District Court level, where Sato and Suzuki will stand trial, only 24 ended in acquittal – a conviction rate of 99.8%.



**image** At Japanese embassies around the world activists have stood in solidarity with Junichi and Toru and declared themselves as 'co-defendants', asking the Japanese government to "Arrest Me Too" and to put "Whaling on Trial".

# Harsh justice

The Japanese government views the almost perfect record of prosecutors as evidence that the justice system is functioning well and that no innocent people are being put on trial. The United Nations takes a very different view. In a 2007 review, the UN Committee Against Torture expressed unusually strong concern about the Japanese justice system. Among others, it made the following comments:

*"The Committee is concerned at the insufficient level of independence of the judiciary, in particular the tenure of judges and the lack of certain necessary safeguards.*

[...]

*The Committee is deeply concerned at the prevalent and systematic use of the Daiyo Kangoku substitute prison system for the prolonged detention of arrested persons even after they appear before a court, and up to the point of indictment. This, coupled with insufficient procedural guarantees for the detention and interrogation 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. In particular the Committee is gravely concerned at:*

[...]

*(d) The length of pre-trial detention in police cells before indictment, lasting up to 23 days per charge;*

[...]

*(h) The limitations of access to defence counsel for detainees in pre-trial detention, and in particular the arbitrary power of prosecutors to designate a specific date or time for a meeting between defence counsel and detainees, leading to the absence of defence counsel during interrogations;*

*(i) The limited access to all relevant material in police records granted to legal representatives, and in particular the power of prosecutors to decide what evidence to disclose upon indictment;*

[...]

*The Committee is deeply concerned at the large number of convictions in criminal trials based on confessions, in particular in light of the lack of effective judicial control over the use of pre-trial detention and the disproportionately high number of convictions over acquittals. The Committee is also concerned at the lack of means for verifying the proper conduct of interrogations of detainees while in police custody, in particular the absence of strict time limits for the duration of interrogations and the fact that it is not mandatory to have defence counsel present during all interrogations."<sup>ii</sup>*

*The UN Human Rights Committee, which periodically examines Japan's compliance with the International Covenant on Civil and Political Rights, one of the main international human rights treaties, has voiced similar concerns in its last three reports.<sup>iii</sup>*

#### Sources

<sup>i</sup> See [http://www.courts.go.jp/english/proceedings/statistics\\_criminal\\_cases\\_index.html](http://www.courts.go.jp/english/proceedings/statistics_criminal_cases_index.html).

<sup>ii</sup> UN Committee Against Torture, Concluding Observations on the Initial Periodic Report of Japan submitted under Article 19 of the UN Convention Against Torture, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, available through <http://tb.ohchr.org/default.aspx>.

<sup>iii</sup> UN Human Rights Committee, Concluding Observations on the Third, Fourth and Fifth Periodic Reports of Japan submitted under Article 40 of the International Covenant on Civil and Political Rights, 5 November 1993, 19 November 1998, 18 December 2008, UN Docs. CCPR/C/79/Add.28, CCPR/C/79/Add.102, CCPR/C/JPN/CO/5, available through <http://tb.ohchr.org/default.aspx>.



**image** Junichi and Toru and their lead counsel Yuichi Kaido attend a press briefing following their first pre-trial arrangement hearing at Aomori District Court in Aomori.

©GREENPEACE

# The pre-trial process

In July 2008, shortly after Sato and Suzuki had been released on bail, the prosecutor took the unusual step of requesting the Aomori District Court to conduct 'pre-trial arrangement proceedings' ahead of the trial. This was a new procedure, devised as a counterpart to the introduction of jury trials in Japan. Jury trials - or 'lay judges' in Japan - commenced in May 2009. Most cases brought prior to that date were handled according to the old procedure.

The purpose of the pre-trial procedure is to determine, in closed hearings, which evidence and witnesses are relevant and may be presented during the trial in open court, and to sort out which files the prosecution must disclose to the defence. By resolving these questions in advance, the actual trial can be conducted more quickly, and the lay judges are not exposed to inadmissible evidence which may confuse or mislead them.

Sato and Suzuki's case will not be heard by a jury, but by a panel of three professional judges. Ordinarily, the case would therefore not have been subject to pre-trial hearings. But the new procedure offered the prosecutor something attractive – the opportunity to seek the exclusion of the evidence of embezzlement prior to the trial, during closed hearings, so that the case could be presented in open court as a simple one of theft and trespass, without considering the possible justification for the taking of the box. A trial in which the defendants would attempt to demonstrate they were being put on trial in retaliation for blowing the lid off a genuine scandal, and causing embarrassment to the authorities, was something the prosecutor was apparently keen to avoid. The defence argued strongly against the motion, but on 1 August, the Aomori District Court announced the case would proceed according to the pre-trial procedure.

Thus began a long battle between the prosecution and defence over the question whether the embezzlement evidence would be admissible during the trial, and whether the prosecutor would have to open his own files on the matter to the defence.



**image** Junichi and Toru arrive with their lawyers at Aomori District Court in Aomori, northern Japan for their first pre-trial arrangement hearing.

# The pre-trial process

## Challenging the official explanation

Because the essence of the second and third defence arguments (see 'The Three Pillars of the Defence Case') would be that Sato and Suzuki's acts were justified because they helped bring a significant scandal to light, it was going to be necessary to debunk the authorities' version of events, according to which there never was a scandal, and the box taken by Sato and Suzuki contained legitimate 'souvenir' whale meat.

Viewed by itself, the official version of events seemed fanciful. Prior to publishing the exposé on the embezzlement scandal, Sato had telephoned Mr. Takahide Naruko, one of the officials responsible for whaling at the Fisheries Agency of Japan, and asked him whether there was any way in which a crew member might legally take any whale meat home from the whaling fleet (see 'Evidence – The Greenpeace Investigation'). Mr. Naruko had strenuously denied the possibility – and Sato had recorded his remarks.

After the exposé was published on 15 May, the ICR and Kyodo Senpaku had provided highly contradictory explanations for the box of whale meat obtained by Greenpeace Japan, before finally agreeing on a definite position in their report on 18 July (see 'The Backlash Commences – The Internal 'Investigation'). Now, they were saying that the Kyodo Senpaku had legitimately bought a large volume of whale meat from the ICR, in order to provide all the crew members (about 240) with 8 kg of the prized *unesu* cut, and 1.6 kg of red meat, as a souvenir at the end of the whale hunt. This arrangement had been in place for years. Since the official price for whale meat was not set by the government until several months later, the transaction had always been conducted according to the previous year's official price. The box of whale meat taken by Sato and Suzuki contained the *unesu* given to a number of different crew members, who had sent their souvenirs together. Nobody had sold their souvenirs on to restaurants or retailers.

However contrived this explanation seemed, it had been accepted by the government and the prosecutor, who had dropped his investigation into embezzlement and decided not to charge anyone. Greenpeace and the defence lawyers set about demonstrating that the truth had been covered up...



**image** Junichi and Toru appear at a press conference with defence counsel Yuichi Kaido following the August 4 pre-trial in Aomori.

© GREENPEACE / MATTHIASWESTFALK

# The three pillars of the defence case

**Most cases involving theft and trespass revolve around the purely factual question whether the defendant entered the property and took the object as charged, or not. Sato and Suzuki's case raises more complicated issues. Neither of them disputes his role in obtaining the box of whale meat. Rather, their defence is that viewed in the context, taking the box was entirely justified and should not be considered a criminal offence. Specifically, the defence case rests on three related legal arguments.**

The first and most basic argument is that Sato and Suzuki lacked any criminal intent in taking the box of whale meat. As in other legal systems, the definition of 'theft' in Japan has two elements – a factual one, and a mental one. The fact of taking property belonging to another is not by itself an offence; the person may be taking the property accidentally, with permission, or with a legitimate purpose. What is necessary is that the person taking the property acts with criminal intent. Under Japanese criminal law, a person has criminal intent if his purpose is to appropriate the property of another person else to himself. The defence lawyers argue that Sato and Suzuki had no intent whatsoever to appropriate a box of whale meat for themselves. On the contrary, their intent was to expose others who were embezzling whale meat on a large scale. They filmed and photographed their act – hardly typical behaviour for someone with criminal intent. Subsequently, they returned the box of whale meat to what they regarded as its rightful owner, the State, well before any theft had been reported.

The second argument is one of justification. Many legal systems recognise that an act should not be considered criminal if it is a proportionate and necessary measure to prevent a greater evil. For example, breaking down a neighbour's door would normally be unlawful, but may be justified if it is necessary to put out a beginning fire. Article 35 of Japan's Penal Code, entitled 'Justifiable Acts', recognises that an 'act performed ... in the pursuit of lawful business is not punishable'. Sato and Suzuki's objective in taking one box was to trigger a police investigation into the suspected embezzlement of hundreds of boxes a year over several years. The act was not only proportionate, it was also necessary – Sato and Suzuki believed that without a piece of very tangible evidence, it was unlikely that the authorities - who were known to have previously turned a blind eye to the embezzlement - could be moved to conduct a genuine investigation. Subsequent events have borne this belief out.



**image** Following the 2007-2008 hunt, workers from the whaling factory ship *Nisshin Maru* unload boxes of what appears to be personal baggage to a Seino Transport truck.

# The three pillars of the defence case

The final and central defence argument relies on international human rights law, and in particular on the right to freedom of expression. Japan has ratified the International Covenant on Civil and Political Rights (ICCPR), one of the main UN human rights treaties, and defendants in criminal trials in Japan may invoke this treaty, which prevails over any conflicting domestic laws.

The defence is highlighting the fact that the undercover investigation undertaken by the Tokyo Two was intended to bring to light wrongdoing in a programme funded with significant amounts of taxpayers' money, and to challenge the scientific credentials of what the government steadfastly maintains, in the face of international criticism, is a legitimate research programme. Bringing to light official wrongdoing and stirring critical debate about government policy are classic examples of the exercise of freedom of expression, a human right which is guaranteed under Article 19 of the ICCPR. This right encompasses not only the freedom to publish information on the activities of public bodies, but also to gather it first.

International courts have stressed the importance of freedom of expression to democracy – without a high level of respect for this right, the open debate about the direction of government policy which is central to democracy will be undermined. Criminal prosecutions of government critics should be used only as a last resort, because they are likely to deter such debate. Moreover, international courts have recognised that NGOs, together with the media, fulfil a key role as the 'watchdogs of society', bringing matters of general concern to the attention of the public. Therefore, their freedom of expression should be particularly carefully guarded.

The defence team will stress it is not arguing for an unconditional 'licence to break the law' for NGOs which conduct investigations. Rather, the Aomori District Court should apply the criteria for restrictions on freedom of expression found in Article 19(3) of the ICCPR. According to this provision, governments may restrict the right through the adoption and enforcement of laws (such as a criminal code) – but only if the restriction serves a legitimate purpose, and is genuinely necessary and proportionate to achieve that purpose.

In this case, the defence will point out, the legitimate purpose the prosecution claims to be serving is the protection of private property of others against unauthorised interference. But in reality, it is highly questionable whether the whale meat Sato and Suzuki intercepted was ever the lawful property of the 'owner' of the box. Indeed, a conviction of Sato and Suzuki would do more to discourage other individuals from investigating and exposing theft, than it would do to discourage theft itself. Therefore, in the specific circumstances of this case, respecting the defendants' right to freedom of expression is more important than defending the right to private property. A conviction of the defendants is not genuinely necessary for any legitimate purpose, and would violate Article 19 of the ICCPR.



**image** A personal box, one of four, couriered from the *Nisshin Maru* to the home address of a senior crew member. The box contained 23.5kgs of stolen whale meat; the consignment sheet claimed the box contained cardboard.

©GREENPEACE



# The Fisheries Agency denies disclosure

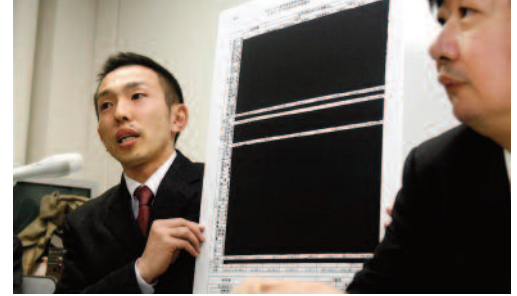
To provide over 240 crewmembers with a souvenir of almost 10kg each, Kyodo Senpaku would have had to buy 2.4 tonnes of whale meat. Since the souvenirs consisted mostly of the expensive unesu cut, this meant a sizeable transaction involving public funds, allegedly conducted every year. Surely, the defence team reasoned, there would have to be a paper trail for these deals, if they really took place.

In 1999, Japan adopted the *Law Concerning Access to Information Held by Administrative Organs*, a freedom of information act which allows citizens to obtain copies of government files. Relying on this law, Greenpeace Japan requested and obtained a copy of the *Special Research Operation Procedure*, the rules set by the government for the ICR's use of the subsidies it receives, and the whale meat it produces.

Although parts of the document were blacked out, Article 13 confirmed that no whale meat can be sold without prior approval from the Director-General of Fisheries Agency of Japan (FAJ). In order to obtain approval, the ICR must submit a form detailing the volume of each type of whale meat produced, the amount being sold, the sales method, and the party to which the meat is being sold.

Article 13 of the *Special Research Operation Procedure* states that:

- 1) With respect to the processing of whales captured in the Cetacean Capture Research, in view of effective utilisation, the whale products can be sold domestically and the proceeds from the sale can be considered as income. However, the sale of whale products requires prior approval of the Director-General of Fisheries Agency of Japan per research.
- 2) In obtaining the approval as described in the above paragraph, ICR shall indicate the volume of production for each type of whale product in the separate form; and when making such sale on its own, a projected sales volume and sales method; when consigning to a third party, the names of the consignee and commission to the consignees, etc shall be indicated in the application form respectively.
- 3) Upon completion of the sales of whale products, ICR shall immediately report the sales figures to the director-general of Fisheries Agency of Japan in a separate designated form.



**image** Junichi Sato displays the whale meat production statistics 'disclosed' by the FAJ. The blacked-out rows detail the amount of each different cut of whale meat produced, how this meat was apportioned between different uses (such as distribution in schools and hospitals, and commercial sales), and the proceeds.

# The Fisheries Agency denies disclosure

Next, Greenpeace Japan asked the FAJ to disclose the 2006 and 2007 sales statistics for whale meat produced by the Southern Ocean whale hunt, as reported by the ICR to the FAJ. If Kyodo Senpaku had really bought whale meat for use as souvenirs from the ICR, the sale would have to be registered in these documents. What is more, these documents might also tell another story – if crew members had been pilfering the best cuts of whale meat, and the statistics had not been doctored, a shortfall would be visible in the amount of choice cuts produced.

Furthermore, Greenpeace Japan requested a copy of the sales contract between the ICR and Kyodo Senpaku. It might be expected that an annual transaction involving over two tonnes of whale meat would be mentioned in this document.

The Fisheries Agency did disclose the requested documents – but virtually all of their contents were masked, and nothing of use remained legible. On the sales statistics documents, the amounts of each type of whale meat produced were blacked out, with only the production sub-totals still visible. This made it impossible to judge whether there was a relative shortfall of expensive cuts, compared to cheaper ones. Moreover, the names of the companies that purchased the meat were masked. Thus, Greenpeace Japan was unable to ascertain whether Kyodo Senpaku had purchased meat for souvenir purposes. In the sales contract, only the heading and footer remained legible – the entire substance of the agreement had been covered up.

Greenpeace Japan appealed the refusal to disclose the documents in full. At the time of writing, the appeal remained pending.

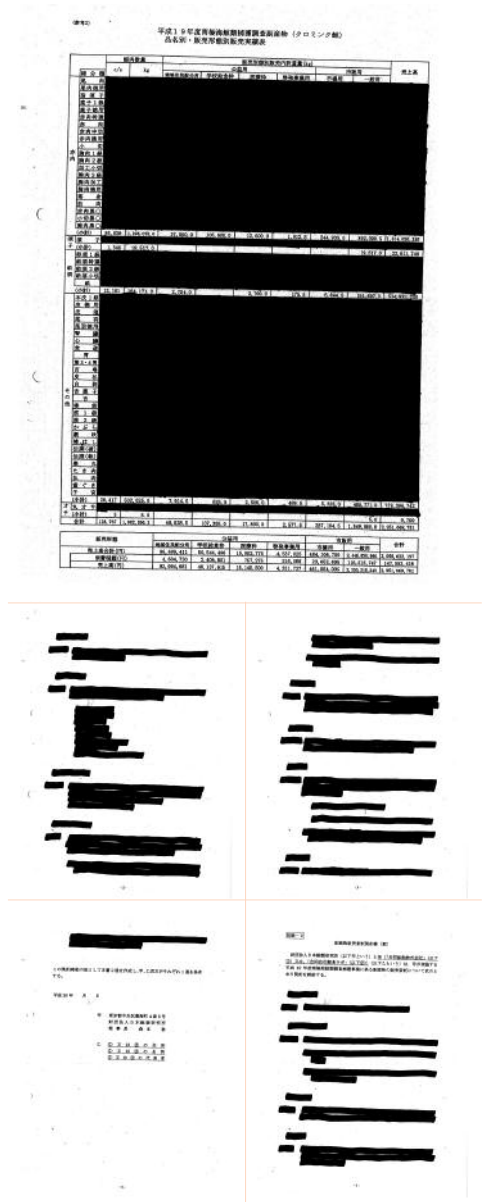


image The sales contract between the ICR and Kyodo Senpaku. The only legible parts are the title of the contract, the names of the parties and the final date and signatures.

# The story of A:

## Clues for a cover-up emerge from the prosecutor's files

With the FAJ refusing to disclose the documents that could conclusively disprove the official version of events, there was one other place the defence could turn to: the prosecutor's files. For about a month after the publication of Greenpeace's findings on the embezzlement scandal, the Tokyo Prosecutor had conducted an investigation, interviewing several crew members of the whaling fleet, before abruptly dropping the case without bringing any charges – on the very same day that Sato and Suzuki were arrested.

In October 2008, early on in the pre-trial process, the prosecutor agreed to partially disclose an important set of documents to the defence – the statements made to police by the production worker whose box of whale meat Sato and Suzuki had taken from the mail depot. We will refer to him as 'A'.

According to the Preparatory Statement written and circulated by the Defence Council, A had been interviewed by police a number of times in May and June 2008. Examining the disclosed statements, the defence team discovered he had substantially altered his story each time, in the end arriving at an account which was more or less consistent with what the ICR and Kyodo Senpaku had been declaring in public. At his first interview, he claimed to have received 25 kg of whale meat from one other crew member, who in turn had obtained the meat from others who were not interested in their whale meat 'souvenir'. The following day, Kyodo Senpaku submitted its report to the FAJ stating that A had received whale meat from three other crew members. A week later, A altered his statement to say that two other crew members had given him meat, and put the date on which he had obtained the whale meat three weeks later than in the first interview. Another ten days later, he amended his story again, stating he had been mistaken and now realised he had received whale meat from four colleagues.

A's explanation of how he used the whale meat that did reach his house also changed over the course of his interview. At first, he maintained that some of it had been eaten at home and another part given away to friends and family. There was also some left over, which was still in his possession. At a subsequent interview, however, A asked to correct his statement, disclosing that his wife had taken about a quarter of the meat to the snackbar she runs, where she had served it to her clientele, allegedly free of charge.

In addition to the box taken by the Greenpeace investigators, A admitted to having sent himself further whale meat in another box. He claimed to have sent himself four pieces of *unesu*, red whale meat and almost 30 kg of whale meat off-cuts and intestines. This is all in addition to the box of *unesu* intercepted by Sato and Suzuki. Suzuki had noted four heavy boxes with suspicious consignment labels addressed to A's house at the Seino Transportation depot. A also claimed his family had eaten almost all the 30kg of intestines and off-cuts within the month – an extraordinary amount.

An important aspect of the right to a fair trial, recognised under international law, is that the prosecution must in principle disclose all relevant evidence to the defence. This includes not only evidence which the prosecution intends to use against the defendant, but also exculpatory evidence – that is, evidence which may assist in showing the defendant's innocence, or to mitigate the offence.



**image** International Human Rights lawyer Richard Harvey talks at a press conference held after a delegation from Greenpeace lodged a formal appeal with the Fisheries Agency of Japan, requesting the release of uncensored documents relating to the sale of whale meat by the Institute of Cetacean Research.

# The Story of A:

## Clues for a cover-up emerge from the prosecutor's files

In the case of Sato and Suzuki, any documents which may help to prove the existence and scale of the embezzlement can be considered exculpatory evidence. Such evidence after all supports the defence argument that Sato and Suzuki's act was a justified and proportionate measure to bring a genuine scandal to light. Based on this, the defence lawyers believed strongly that the prosecutor was under an obligation to disclose more of the files from the police investigation. The extensive contradictions in **A**'s disclosed statements had already helped to put the official explanation into question. With further disclosures, the defence team might be able to eliminate what credibility that explanation still enjoyed, demonstrating in open court that Sato and Suzuki were on trial as part of a cover-up orchestrated by the authorities.

In January 2009, the defence lawyers submitted a request for the disclosure of 16 items to the prosecutor, including: the undisclosed part of **A**'s statements and the connected police notes; the statements made to police by **A**'s colleagues; the statement of **A**'s wife; the statements made by 12 crew members identified by informant as being the ringleaders in the embezzlement scandal; the statements of the officials of the ICR and Kyodo Senpaku allegedly responsible for the sale and disbursement of 'souvenir' whale meat; and the final report of the Tokyo Prosecutor's investigation into the allegations of embezzlement, including the explanation of his reasons not to prosecute anyone.

### The prosecutor resists further disclosures

Cracks were starting to appear in the prosecutor's case. In a bid to avoid embarrassment to the authorities, the prosecutor began a series of procedural manoeuvres to prevent further disclosures and exclude the issue of embezzlement from discussion at the trial.

Firstly, although **A** would appear to be the main 'victim' of Sato and Suzuki's acts, the prosecutor decided not to call him as a witness, nor to offer his statements as evidence to the court. Evidently, the prosecutor had his own doubts about whether **A** was as innocent as the authorities had made him out to be. Instead, the prosecutor's case focuses on the harm supposedly done to Seino Transportation, and in particular the deliveryman who was forced to inform **A** of the loss of one box filled with 'cardboard', and allegedly paid ¥30,000 (approximately \$295 US dollars at the time) in compensation, out of his own pocket.

Secondly, at the first pre-trial hearing, the prosecutor made an important concession. He informed the Court he would not dispute the fact that Sato and Suzuki intercepted the box as part of an investigation into embezzlement, rather than for personal gain.

At the expense of weakening the charges against Sato and Suzuki somewhat, the prosecutor had bought himself a new argument to oppose further disclosures or discussion of the embezzlement scandal. He contended that, since he had accepted that the defendants believed they were investigating a real scandal, it was no longer necessary to argue over whether or not that scandal had actually existed or not, or to disclose evidence on the subject. The only point for the Court to consider was whether that belief could justify the decision to enter a mail depot belonging to an 'innocent' private company and take a box from there.

The Aomori District Court weighed this argument and, at the third pre-trial hearing on 15 May 2009, indicated it would not go along with the prosecutor's position. The presiding judge stated that the way in which the crew members of the *Nisshin Maru* had obtained the whale meat intercepted by Sato and Suzuki could 'not be excluded from the evidence to be considered'. The Court also indicated that the prosecutor would have to disclose evidence relevant to this issue, and directed him to make a proposal.



**image** Co-signed by Shokichi Kina, an Upper House Diet member of the Democratic Party of Japan, Greenpeace's formal appeal was presented by Jun Hoshikawa (Executive Director, Greenpeace Japan), Sarah Burton (Deputy Programme Director, Greenpeace International), Divya Raghunandan (Campaign Director, Greenpeace India), Von Hernandez (Executive Director, Greenpeace Southeast Asia) and international Human Rights lawyer Richard Harvey.

©GREENPEACE/JEREMY SUTTON/HIBBERT

# The last hopes for a fair trial

**On 11 June 2009, shortly before the fourth pre-trial hearing, the prosecutor provided copies of 26 documents to the defence team. Once again, however, very substantial parts of the documents had been masked. From the sequence of the page numbers, it was clear that a large number of pages were missing in their entirety.**

Although virtually all of the important passages seemed to have been whited out, the defence team managed to glean some useful information from the disclosed documents. Crew members had made disparate statements about the amount of 'souvenir' whale meat they had received from Kyodo Senpaku, contradicting the company's public claim that each crew member receives the same gift of 8 kg of *unesu* and 1.6 kg of red meat. One crew member spoke of the preparation of whale skin and bacon for use as souvenirs. These cuts are not among those that Kyodo Senpaku acknowledges handing out to crew members. However, the remark appears consistent with the statements of one of the informants who spoke to Greenpeace Japan. The informant claimed that whale bacon was being made available to the director and board members of the ICR, as well as members of the Diet, Japan's parliament.

Importantly, the disclosed affidavits also apparently confirmed that there had never been any official, documented sale of whale meat by the ICR to Kyodo Senpaku for use as souvenirs. During his police interview, a senior employee of Kyodo Senpaku claimed that the whale meat for use as souvenirs was provided to the company under an informal, verbal agreement. He explained that, due to slow sales, the ICR used to hold a sizeable inventory of whale meat, produced during the hunts of the previous one or even two years. In 2000, Kyodo Senpaku agreed to purchase any inventory remaining in August of each year. Apparently, this arrangement suited the ICR, helping it clear its inventory before the end of the fiscal year. The employee claimed that the deal made no commercial sense from the point of view of Kyodo Senpaku, however, since it encumbered the company with the cost of storing around 2,000 tonnes of whale meat, without the ICR providing any additional discount in return. Instead, ICR and Kyodo Senpaku had reached a verbal agreement, according to which Kyodo Senpaku would not have to pay for the 'souvenirs' handed out to its staff.

It now seemed clear that the 'paper trail' the defence lawyers had been looking for did not exist. The ICR and Kyodo Senpaku had not been telling the truth when they claimed there had been an official transaction between them, with the whale meat for souvenir use being sold at the previous year's official rate. The Fisheries Agency of Japan had abetted the cover-up by blacking out the documents which would have shown that the supposedly regular sale had never been documented.

The 26 documents turned over to the defence represented only part of the files on the embezzlement scandal whose existence the prosecutor acknowledged. Moreover, amongst the disclosed documents were five files which the prosecutor previously had claimed did not exist. The defence lawyers had every reason to suspect that what had been disclosed so far represented only the tip of the iceberg. At the fourth pre-trial hearing on 17 June, they demanded an explanation for the extensive masking.

The prosecutor responded that the undisclosed parts of the documents contained nothing which would be helpful to the defence's case, and therefore disclosing them would unjustly interfere with the privacy of the individuals concerned. He also maintained, somewhat comically, that the parts of the documents which were not masked clearly demonstrated that there had never been any embezzlement scandal. On 3 July, the prosecutor sent a letter to the Court, complaining that the defence lawyers were unreasonably prolonging the pre-trial process by pursuing excessive disclosure requests.



**image** The Japanese whaling fleet unloads whale meat boxes in the port of Kanazawa, Japan.

©GREENPEACE/JASANYA NODA

# The last hopes for a fair trial

## The defence unsuccessfully appeals for disclosure

It was now clear that the prosecutor would not voluntarily release any further exculpatory evidence. On 17 July, Sato and Suzuki's lawyers filed a motion with the Aomori District Court for a disclosure order.

On 10 August, the Court issued its decision, completely denying the requested order. In a clear departure from its earlier position, it sided with the prosecutor's argument and held that the question as to whether or not crew members of the whaling fleet had engaged in embezzlement of whale meat was irrelevant to the trial. Since the prosecutor had accepted that Sato and Suzuki's objective had been to investigate embezzlement, it was enough to consider, in the abstract, whether this objective justified entering the mail depot and removing the box of whale meat. This also meant that further disclosures on the subject of embezzlement were unnecessary. The Court dismissed the argument that the actual existence and scale of the embezzlement scandal was relevant to the proportionality of the defendants' acts – without stating a clear reason.

With the issue of embezzlement now largely ruled out of discussion in open court, there were strong doubts whether Sato and Suzuki could receive a fair trial and a fair hearing in the media. Their trial would proceed largely as a simple case of trespass and theft. The defence team filed an appeal against the decision on 13 August – an unusual step in Japan, where defendants face virtually certain conviction in every case, and the objective for the defence lawyers is usually to bring the trial to a speedy end with the lowest possible penalty.

The Sendai High Court returned its verdict on 29 September. It completely rejected the appeal, largely restating the arguments presented by the Aomori District Court.

In a final bid to secure a fair trial, the defence made a special appeal to the Supreme Court on 5 October. Support for the appeal came in from across the world. More than 3,000 people, including several leading human rights lawyers, sent letters to the Supreme Court, urging it to uphold Japan's obligations under international law and ensure full disclosure of the exculpatory evidence. Amnesty International wrote that, by ordering disclosure, the Supreme Court could "ensure that it does not condone the improper use of the police power to infringe on the rights of freedom of expression and association of those who seek to expose alleged government wrongdoing."

On 18 November, the Supreme Court issued a five-line ruling, denying the appeal.



**image** Junichi Sato and Toru Suzuki appear with Tokyo Two defence counsel lawyers Yasushi Tadano and Kazuo Hizumi at a press conference in the Tokyo High Court Judicial Press Club, to announce the launch of an appeal to the Supreme Court. The appeal called for the disclosure of key embezzlement evidence in the Tokyo Two trial, and followed a similar request to the Sendai High Court that was rejected. The appeal asserted that, if the prosecutor did not disclose key evidence, it would be a violation of Article 37(2) of the Japanese Constitution, as well as Article 14(3)(b) of the International Covenant on Civil and Political Rights, which guarantee the right to a fair trial.

# Quick Facts



- Greenpeace identified 33 consignment notes showing that 23 crew members sent at least 93 boxes to their homes and other locations.
- The boxes were sent to at least 30 addresses by 23 crew members, out of whom 12 appear on the employee register obtained by Greenpeace. Those 12 were all production workers in charge of processing the whale meat on the *Nisshin Maru*.
- The sender of the box that Greenpeace obtained sent four heavy boxes in total to his home address in Hokkaido. The box taken by Greenpeace contained 23.5 kg of prime cut whale meat called *unesu*.
- The market price of *unesu* bacon in the Japanese restaurants and supermarkets at this time was around 5,000 yen (about \$50 US dollars) to 15,000 yen (about \$150) per kilo. Greenpeace estimates the value of the unfinished product in the box to be between \$1000 and \$3000 US dollars.
- Junichi was interrogated for around 80 hours in total
- Toru was interrogated for around 120 hours in total
- Interrogation took place three times a day
- During the interrogations, no lawyers were present and no recordings made.
- On 11 July 2008 in Aomori, Junichi and Toru were indicted for theft of whale meat worth 58,905 yen (\$550) and trespass at the Seino Transportation depot.
- Only 5% of Japanese people continue to consume whale meat.<sup>i</sup>
- Japan's confession rate was 91.2% in 2004, the last year for which figures are available from by the Supreme Court.
- At the District Court level, Japan's conviction rate is 99.8% according to the same 2004 figures.

**Sources**

<sup>i</sup> 'Opinion Poll on Research Whaling, Year 2008, Internet Survey', commissioned by Greenpeace Japan and prepared by Nippon Research Center Ltd (a member of Gallup International). Available at: [www.greenpeace.org/international/press/reports/japanese-opinion-whaling-2008](http://www.greenpeace.org/international/press/reports/japanese-opinion-whaling-2008)

# Unanswered questions



- If the whale meat was a 'souvenir' as the whaling companies claim, then:
  - Where is the proof that it was legitimately purchased?
  - Why did only a small number of crew take home large quantities of the meat, using Seino Transport, if all are entitled to it?
  - Why was it salted rather than frozen like the rest of the meat if it was an official gift?
  - If it was a gift, why were the boxes given obscure labels such as 'cardboard', and why was the meat hidden under dirty clothes?
  - If this was a legitimate practice, why have all the whale meat sales figures and other related documents requested by Greenpeace under freedom of information laws been heavily censored?
- Why did the transport company only report the 'theft' of the box after Greenpeace's press conference presenting it, weeks after it happened? Why wasn't it reported immediately?
- Why was the criminal complaint not filed by the person who is supposedly the real victim – the 'owner' of the box?
- Why did the prosecutor drop the investigation into the whale meat scandal on the same day Junichi and Toru were arrested?
  - Why are there three judges instead of the usual one?
- If this is a trial about a 'theft', then:
  - Why are there three judges instead of the usual one?
  - Why were there extended raids on Greenpeace offices by upwards of 70 police officers?
  - Is this not overkill for a box of whale meat the prosecutor alleges to be worth no more than \$500 US dollars?
- If the crime was so minor, why was bail set at 4 million yen (around \$45,000 US dollars, or roughly 10 times what the box of meat was allegedly worth according to the prosecutor)?
- Why does the government prop up a programme that is:
  - harmful to Japan's international reputation
  - loss-making
  - environmentally unsustainable
- Why does it turn a blind eye to apparent unlawful practices?





# Timeline



**This complicated case has had many twists and turns over the two-plus years it has taken for the whale meat embezzlement scandal to be investigated, exposed, covered up, and finally culminate in the wrongful trial of the Tokyo Two. Here is a list of all significant developments:**

## 2008

**January:** Greenpeace approached by former whaling fleet crew member who says that crews regularly take large amounts of whale meat off the ship to sell for personal profit. Greenpeace launches investigation that will run for 4 months.

**15 April:** *Nisshin Maru* docks in Tokyo and crew members unload at least 93 boxes of suspicious 'personal baggage' – labelled 'cardboard', 'salted stuff', etc – shipping them to 30 destinations.

**16 April 16:** Greenpeace activists track one box to the Seino Depot in Aomori and remove it to verify its contents and gather evidence of the informant's claims.

**8 May:** Junichi calls Mr Takahide Naruko, Fisheries Agency of Japan chief of Far Seas Fisheries to question him about whale meat 'souvenirs'. Naruko dismisses the concept of 'souvenirs' outright.

**15 May:** Greenpeace holds press conference in Tokyo to present investigation findings and the box of meat to media, exposing the embezzlement scandal. Criminal complaint against 12 crew members of the *Nisshin Maru* lodged with Tokyo District Public Prosecutor's Office.

**20 May:** Tokyo District Public Prosecutor's office confirms there will be an investigation into the whale meat scandal.

**27 May:** Junichi and Toru send detailed statements of what they did to Aomori police.

**11 June:** Prominent news outlets report that embezzlement case is to be dropped while investigation against Greenpeace would continue. Pro-whaling politicians meet in the evening.

**19 June:** Junichi receives phone call from TV news reporter who says: "you will be arrested tomorrow, so I would like to have an interview with you now."

**20 June:** Junichi and Toru arrested by 10 police officers, while more than 70 police raid Greenpeace Japan's offices and homes of 4 staff members. Servers and many documents confiscated. Media are tipped off, so arrests and raids are heavily reported, effectively 'tar and feathering' Greenpeace in Japan; most news reports critical of Greenpeace, however, opinion pieces argue that 'scientific whaling' should also be investigated. On very same day, Tokyo District Prosecutor's office announces it has dropped investigation of embezzlement by crew members.

**30 June:** Peaceful protests held at Japanese embassies around the world.

**10 July:** Joint statement of concern issued by 35 international NGOs.

**11 July:** Junichi and Toru charged with trespass and theft, remain in custody.

**14 July:** Amnesty International expresses concern to Japanese Prime Minister.

**15 July:** After 26 days in custody - 23 without charge or their lawyers being present during interrogations - Junichi and Toru released on 4 million yen (around \$40,000 US dollars) bail each.

**18 July:** Responding to instructions from Fisheries Agency of Japan that they conduct an internal investigation into embezzlement scandal, the ICR and Kyodo Senpaku hand back a 1-page document claiming no embezzlement as meat was a 'souvenir'.

## 2009

**19 January:** Greenpeace receives documents released following freedom of information request for material related to whale meat sales and reports submitted by ICR over last few years. Documents are so heavily censored they contain almost no information.

**13 February:** First pre-trial meeting takes place.

**19 March:** Greenpeace launches appeal for release of uncensored versions of documents received on 19 January.

**23 March:** Pre-trial meeting sees Aomori judges rule that prosecution must justify why embezzlement evidence is to be excluded.

**14 April:** *Nisshin Maru* docks in Shimonoseki after another season in Southern Ocean. Practice of giving crew 'souvenir' whale meat has been discontinued, according to insider reports.

**15 May:** Aomori court agrees to hear evidence of whale meat embezzlement.

**4 August:** Pre-trial meeting sees judges request prosecution submits all embezzlement evidence to them for evaluation.

**11 August:** Aomori court denies defence counsel requests for disclosure of important evidence including police files and statements by owner of box of embezzled whale meat. Junichi and Toru appeal to Sendai High Court.

**5 October:** Sendai High Court rejects appeal for disclosure of evidence. Defendants take appeal to Tokyo Supreme Court.

**November:** Over 3,000 lawyers, individuals and organisations, including Amnesty International, write to Tokyo Supreme Court in support of appeal.

**18 November:** Tokyo Supreme Court rejects disclosure appeal, depriving Junichi and Toru of important means to prove their innocence.

**20 November:** Another pre-trial hearing passes with no agreement on witnesses or evidence.

## 2010

**15 January:** The final pre-trial saw the court accept all five key defence witnesses. The full trial is set to commence at 10am on 15 February.

# The research whaling triangle



**Officially, Kyodo Senpaku catches the whales, the ICR conducts the research, and the Fisheries Agency gives its seal of approval and partially funds the research, but the relationship between the three runs far deeper than this. It is no coincidence, for example, that the ICR and Kyodo Senpaku were both formed in 1987 – the same year as the IWC moratorium on whaling came into force.**

## Kyodo Senpaku

A private company, Kyodo Senpaku Kaisha Ltd. is the result of several rounds of mergers and restructuring of Japan's pelagic fishing companies. The 1987 IWC moratorium and subsequent contraction of the whaling industry saw a former armada of over 100 boats and 10,000 seafarers shrink to one factory ship - the Nisshin Maru - three catchers, eight ex-catchers and a staff of 321.

Kyodo Senpaku now functions more as a charter operation, renting whaling vessels to only two clients: the ICR and the FAJ. It relies on the government for work.

## Institute of Cetacean Research

The ICR was founded in 1987 as a 'zaidan hojin', a non-profit organisation, and exists primarily to conduct 'research' on Southern Hemisphere minke whales.

Kyodo Senpaku provided around ¥1,250 million towards its start up costs, with members of the public providing the remaining ¥50 million. The FAJ also provided a ¥346.2 million fund to cover costs for the remainder of 1987. Since then, the ICR has been given a ¥500 million annual allocation from the FAJ as well as benefiting from the proceeds of the sale of meat 'by-products' of the Southern Ocean hunt.

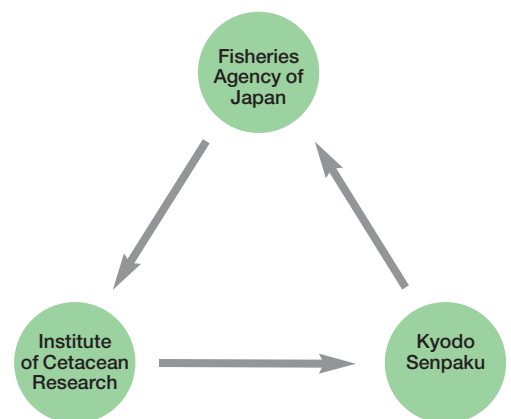
**Directors of the ICR have been successive retired officials from the FAJ.**

## Fisheries Agency of Japan

The FAJ is the government body responsible for licensing and monitoring the taking of fish and cetaceans in Japanese waters or by Japanese vessels. It is the major source of funds for research on cetaceans.

The last six directors of the ICR are ex-FAJ officials. There is a strong incentive for the FAJ to defend and prop up whaling as its senior civil servants are often able to go into early retirement, receive significant bonuses, and take up plush jobs in ICR management. This practice is called 'Amakudari', which translates as 'descent from heaven' – or, as it is more commonly known, 'golden parachute'. If the FAJ were to end whaling, ex-FAJ officials would lose their jobs and the current officials would lose the opportunity to take up these positions.

**There are three main organisations behind Japan's 'research' whaling.** These are Kyodo Senpaku, the Institute of Cetacean Research (ICR) and the Fisheries Agency of Japan (FAJ).



## More spent on PR than Research

The ICR receives around ¥1 billion a year in subsidies from the public purse. According to information it has disclosed, its annual operating cost is ¥740,000,000 after necessary expenses. Amazingly, for an apparently 'scientific' organisation, 70% of this - more than ¥540,000,000 - is spent on public relations. For the research itself, only ¥150,000,000 is appropriated.

## Golden Parachutes

The public officer's remuneration paid to the Director General is as much as ¥12,420,000 per annum (equivalent to a deputy chief secretary's salary), and even the Directors receive ¥10,500,000 per annum, for which they are responsible to the taxpayer. As of 16 September, 2009, the Director General is Minoru Morimoto, former deputy head of the Fisheries Agency. The Board of the ICR also includes Yoshiyuki Shige, former head of the Breeding Department of the Fisheries Agency, as Director, and Masao Shimomura, formerly attached to the Resources and Production department of the Fisheries Agency, as Auditor. The Institute is heavily populated by former Fisheries Agency officials.

# Support for the Tokyo Two



## Public support

When the news of Junichi and Toru's arrest broke, people around the world staged protests outside Japanese embassies. The global day of action saw people hold peaceful vigils, deliver letters of protest and support for the Tokyo Two, and stage other public displays to highlight this injustice in 25 countries around the world. Regular protests outside embassies have continued ever since.

Many prominent Greenpeace staff and lawyers have travelled to Tokyo to publicly protest the case as 'co-defendants' of the Tokyo Two, highlighting the dangerous precedent prosecution of campaigners scrutinising government policy and the use of public money.

Four renowned professors of international law have submitted expert opinions on behalf of the defence. One of these experts, Professor Dirk Voorhoof of Ghent and Copenhagen universities, a leading authority on the law of freedom of expression, came to the conclusion that:

*"The [...] arrest, detention and prosecution of Sato and Suzuki on suspicion of trespass and theft and moreover the searching of Greenpeace offices and homes of Greenpeace staff members and the confiscation of a range of items including the office server are, according to international standards, to be considered as unjustified and disproportionate interferences in the freedom of expression of Sato, Suzuki and Greenpeace Japan."*<sup>i</sup>

Over a third of a million people around the world have participated in cyberactions, and more than 140,000 have sent origami whales and signed petitions calling for the release of the Tokyo Two.

## International NGO support

In 2008, Amnesty International, IFAW, WDCS and Human Society International issued a joint statement of concern to the Japanese Prime Minister at the time, asking him to "Please release Junichi Sato and Toru Suzuki and provide Greenpeace Japan and all other Non-Governmental Organisations working in Japan with the rights guaranteed under international law to organise and protest peacefully."

In 2009, Amnesty International wrote another letter in support of Junichi and Toru's motives and actions, with its Director of Policy Michael Bochenek saying that "the government's prosecution of these two activists is an unjustifiable interference with their rights to freedom of expression and association."

The UN has criticised Japan's legal system three times in recent years for failing to uphold human rights standards:

- 1) UN Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Japan submitted under Article 40 of the International Covenant on Civil and Political Rights, 18 December 2008, UN Doc. CCPR/C/JPN/CO/5. Relevant paragraphs: 18 and 26.
- 2) UN Committee Against Torture, Concluding Observations on the Initial Periodic Report of Japan submitted under Article 19 of the UN Convention Against Torture, 3 August 2007, UN Doc. CAT/C/JPN/CO/1. Relevant paragraphs: 13 and 15
- 3) UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Japan submitted under Article 40 of the International Covenant on Civil and Political Rights, 19 November 1998, UN Doc. CCPR/C/79/Add.102. Relevant paragraph: 26

All available through <http://tb.ohchr.org/default.aspx>



**image** Executive Directors of several Greenpeace offices protest at Shibuya Crossing in the heart of Tokyo in support of the two Greenpeace activists, Junichi Sato and Toru Suzuki, who face trial for their activities in the anti-whaling campaign. The activists hold protest signs in various languages.



**image** Thousands of people around the world protest the arrest of Junichi and Toru outside Japanese embassies.



INTERNATIONAL FUND FOR ANIMAL WELFARE



Whale and Dolphin Conservation Society

### Sources

<sup>i</sup> Opinion of 1 March 2009, page 3, available online at [http://www.greenpeace.or.jp/press/releases\\_en/attached/20090323EvidenceVoorhoof.pdf](http://www.greenpeace.or.jp/press/releases_en/attached/20090323EvidenceVoorhoof.pdf).



## Celebrity Support

A range of international stars have pledged their support for Junichi and Toru. Betty Williams, Benicio del Toro, Bryan Adams, Desmond Tutu, Edd Byrnes, Thandie Newton and German rock band The Scorpions have signed an open letter to the Japanese government which reads:

*“We are very concerned about the prosecution of these two activists and harassment of Greenpeace for exposing wrong doing. It is contrary to the Japanese government’s obligations under human rights law and raises serious questions about their commitment to freedom of expression and justice.”*

*“We are also concerned that the Japanese government continues to flout an international ban on whaling, by conducting hunts in the Southern Ocean whale sanctuary under the guise of ‘scientific research’. How can it be that despite killing thousands of whales over two decades Japan has made no useful scientific discoveries? The only answer is that the programme is nothing to do with science, but simply a way of circumventing the internationally agreed whaling ban.”*

Other celebrities, including, Emma Thompson and William Shatner have also expressed their support for Junichi and Toru, and Greenpeace’s calls to the Japanese government for it to drop the case against the Tokyo Two, honour its commitment to uphold human rights, re-open the investigation into the whale meat embezzlement scandal, and ultimately end its ‘research’ whaling operation.

## Toru in Australia

In September 2009, Toru travelled to Australia to meet with politicians, government officials, media and the public, to raise awareness of the Tokyo Two’s case and the opportunities it and the recent change of government in Japan have created to end Japan’s Southern Ocean whaling programme.

The Democratic Party of Japan has promised more progressive policies than the old government, such as ending wasteful spending of tax money, increase transparency and root out bureaucratic corruption, and its rise to power saw much of the pro-whaling old guard fall. This has created new space for Greenpeace to campaign on ending whaling from the point-of-view of economic and bureaucratic corruption, and has opened diplomatic doors for foreign governments that were previously closed.

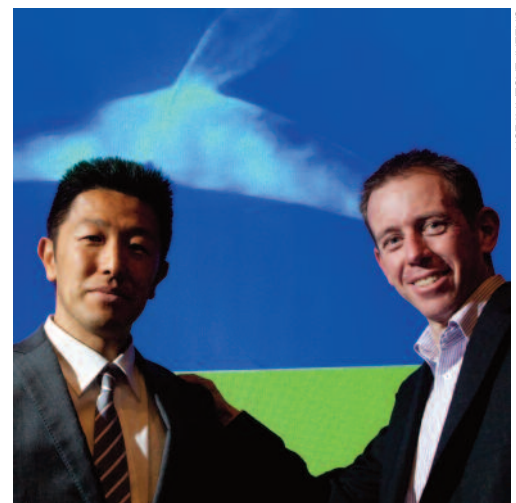
This was the message Toru took to Australian politicians such as Shadow Minister for the environment Greg Hunt, Greens Senators Rachel Siewert and Shane Rattenbury, and NSW parliament Member Ian Cohen. He also met with officials from the Minister for the Environment, Peter Garret’s office, and officials from Australia’s department of foreign affairs and trade.

Like Japan, Australia is a signatory to the International Covenant on Civil and Political Rights. This means that Australia has a responsibility to ensure that all parties to the convention uphold its tenets, and ensure Japan’s legal system does not violate Junichi and Toru’s basic human rights.



**image** Rock star Bryan Adams helps publicise the Tokyo Two trial by painting a manga comic of Junichi and Toru’s story. He has also spoken out publicly on the trial on the BBC.

©GREENPEACE/JOHN COBBE



**image** Australian Greens Senator Shane Rattenbury and Toru Suzuki pose for a photo following a presentation by Suzuki on the whale meat embezzlement scandal in Australia’s Parliament House. Suzuki was in Australia to discuss the opportunities to end whaling in the Southern Ocean that are offered by the first real change of government in Japan for 50 years.

©GREENPEACE/TAYLOR