

This was the first decision on the matter by the Supreme Court, which took the same position as those of the lower courts.

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8. International Law

1. The principle of double criminality in extradition.

Decision by the Fifth Special Division of the Tokyo High Court on March 30, 1989. Case No. (*te*) 44 of 1989. 703 *Hanrei Taimuzu* 284.

[Reference: Treaty on Extradition between Japan and the United States of America, Article 2; Japanese Extradition Act, Article 2.]

[Facts]

Zhou, the fugitive offender of this case, intentionally conspired with K.Y.L. and others on numerous occasions between January 1985 and December 1987 in eastern New York and other areas, to import more than 100 grams of heroin into the U.S.. He was indicted in the New York Eastern District Federal Court on December 21, 1987, and a warrant for his arrest was issued the same day. The U.S. made a request to Japan for provisional detention on the basis of Article 9(1) of the Treaty on Extradition between Japan and the United States of America (hereinafter referred to as “the Extradition Treaty”). Zhou was provisionally detained in accordance with Article 25 of the Japanese Extradition Act (hereinafter referred to as “the Extradition Act”) and held in the Tokyo Detention House. On March 1, the U.S. made a request to Japan for his extradition based on Article 8 of the Extradition Treaty. Two days later, in accordance with Article 8 of the Extradition Act, the Tokyo High Public Prosecutor’s Office requested the Tokyo High Court to make a judgment

concerning the legality of extradition in this case.

[Opinions of the Court]

Extradition approved.

In considering the double criminality requirement stipulated in Article 2 sections (3) and (4) of the Extradition Act, we should not simply compare the constituent elements of the offense in the two states involved. For it is not uncommon that the elements of the same offense differ among states. Rather, before considering these elements, we must examine the act of the offense itself, and determine whether the act includes elements appraised as a crime under Japanese law.

In this case, specific acts of the offender, including having transported between fifty and three hundred thousand dollars in profits from heroin trafficking (funds for trafficking) from the U.S. to Hong Kong on at least ten occasions, and having contact with co-conspirators, constitute a violation of the prohibition of complicity in the importation of heroin under Japanese law.

This complicity comprises the elements of an extraditable offense. Therefore, even though conspiracy to import heroin is not stipulated as an offense in Japanese law, we can conclude that the conditions of double criminality are fulfilled, and that the Japanese government can extradite the fugitive offender in this case.

[Comment]

(1) This case concerns a U.S. request to Japan for the extradition of a fugitive offender. In 1978, the two states signed the "Treaty on Extradition between Japan and the United States of America" (entry into force on March 26, 1980). Following this treaty's entry into force, there have been several cases in which extradition was examined and decided upon by the courts. In these cases, the courts have allowed extradition because those offenses examined amounted to extraditable crimes. In this case, the court examined in detail the principle of double criminality, which is a condition of an extraditable offense under Article 2 of the Extradition Treaty, and found that the condition was fulfilled. Although, in general, the extradi-

tion of fugitive offenders requires fulfilment of this principle, in this case, the issue of what the criterion for such a decision should be was examined.

(2) According to the principle of double criminality, the state which is requested to extradite a fugitive offender will not do so unless the offender's crime can be punished under the laws of that state in the case of the same act being committed within its territory. The bases of double criminality are the principle of *nullum crimen sine lege* and the principle of reciprocity; it is not valid for a requested state to extradite offenders whose crimes are not punishable in that state because such extradition would restrict the fundamental human rights of those extradited; secondly, reciprocity guarantees that the requested state is not forced to extradite offenders for crimes for which it itself does not request extradition. The basic articles concerning double criminality are Article 2(1) of the Extradition Treaty and Article 2(5) of the Extradition Act.

(3) In this case, Zhou committed the crime of conspiracy to import heroin under U.S. law. Conspiracy, however, is not a crime under Japanese law. Therefore, the issue is whether the requirement of double criminality can be fulfilled; that is, whether the condition of double criminality must be met by the constitutive elements of the offense or whether it can be met by the very act of the offense. In the former case, the requirement of double criminality is not fulfilled, but, in the latter case it is.

In general, it is submitted that the condition of double criminality is fulfilled if the act is recognized as an offense in both states regardless of the constitutive elements of that offense. The reason for this is that in different states the elements of an offense vary according to the differences in conditions or in the system of law of each state. Identification of the elements of an offense leads to a denial of double criminality in this situation. But it is an unjust result that the difference in legal technique denies extradition even though the act itself is punishable; this result does not fulfill the object of the system of extradition. Furthermore, as mentioned above, one of the bases of the principle of double criminality is that extradition should not be granted in cases in which the act in question would

not be punishable in the requested state. This basis does not prevent us from interpreting double criminality from the nature of the act of the offense. Therefore, we can construe the element of double criminality from that act.

The court made its decision following this line of reasoning. In this case, the U.S. requested extradition for conspiracy to import heroin, but this is not a punishable offense under Japanese law. The U.S., at the same time, indicated as the facts of the case, transportation of funds, attendance at meetings for the planning of the importation of heroin, and contact with other members of the organization. The court recognized double criminality because these acts constituted, at least, complicity in importing heroin under Japanese law. Based on the same facts, the U.S. requested extradition for conspiracy, but Japan approved it on the basis of complicity. I believe this decision is valid and correct. A decision of a similar type can be found in the case in which the U.S. requested extradition of a Japanese national for the transportation into Japan of automobiles which he had embezzled (Decision by the Second Civil Division of the Tokyo District Court on March 19, 1984, Case No. (*gyo-ku*) 16, 534 *Hanrei Taimuzu* 138—39) and the case in which the U.S. requested extradition of an embezzler of a bank account (Decision by the Fifth Special Division of the Tokyo High Court on December 1, 1988, Case No. (*te*) 238, 690 *Hanrei Taimuzu* 250).

2. The principle of compensation by the Power on which prisoners of war depend in international customary law.

Decision by the Twenty Sixth Civil Division of the Tokyo District Court. Case No. (*wa*) 4024 and 8293 of 1981, (*wa*) 731 of 1982, (*wa*) 12166 of 1985. 1329 *Hanrei Jihō* 36.

[Reference: Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter referred to as "1949 Geneva Convention", Articles 66 and 68. Vienna Convention on the Law of Treaties, Article 28. The Statute of the International Court of Justice, Article 38.]

[Facts]

During the last period of the Second World War, the Soviet Union unilaterally denounced the Japan-Soviet Neutrality Pact on August 8, 1945, and in accordance with a secret agreement made at Yalta, declared war on Japan. Approximately seven hundred thousand Japanese prisoners of war were captured, transported to Siberia, and subject to forced labor under poor living and sanitary, and harsh labor conditions. Although all survivors returned by 1955, approximately sixty thousand prisoners died during internment and many of the survivors suffered various diseases and injuries.

In this case, the plaintiffs, Kanbayashi and 61 others, who were interred in the Soviet Union and subject to forced labor, brought suits first, claiming compensation under Articles 66 and 68 of the 1949 Geneva Convention and international customary law for the long internment in Siberia and forced labor; second, claiming compensation based on the Japanese waiver of claims against the Soviet Union for reparation for the above-mentioned damages of the prisoners of war interned in Siberia; third, claiming damages for the neglect by the Japanese government of the prisoners long interned in Siberia and the lack of compensation following the above-mentioned waiver against the Soviet Union; and fourth, claiming compensation on the basis that Japan had an obligation of security towards those interned in Siberia.

[Opinions of the Court]**(1) Application of the 1949 Geneva Convention.**

The 1949 Geneva Convention stipulates in Article 66 that the Power on which the prisoner of war depends shall be responsible for settling with him any credit balance. It also stipulates in Article 68 that when a prisoner of war suffers injury or other disability arising out of work, the Power on which he depends shall be responsible for compensation, and is also responsible with respect to monies etc. impounded by the Detaining Power and loss alleged to be due to the fault of the Detaining Power. Japan acceded to this Convention on October 21, 1953, the Soviet Union on November 10, 1954. This con-

vention can thus be applied to both countries.

However, all but three of the plaintiffs returned home before the entry into force of this convention for both countries. The court held, "In general, it is submitted that treaties cannot be retroactively applied except when the particular intention is clear from the treaty itself or when it can be confirmed in other ways" (Cf. Article 28 of the Vienna Convention on the Law of Treaties). The interpretation of the 1949 Geneva Convention or its *travaux préparatoires*, however, does not support the conclusion that there was an intention for it to be applied retroactively.

Two of the plaintiffs, furthermore, were interned until after the convention's entry into force and returned to Japan in 1956. One was interned in China after June 1950 as a suspected war criminal, and was no longer interned in the Soviet Union as a prisoner of war. The other prisoner served a sentence as a suspected spy and was treated as a convicted prisoner. The Soviet Union made a reservation to the effect that it would not apply the convention to prisoners of war who were convicted of crimes under the law of the Detaining Power. Therefore, in these two cases, the convention cannot be applied.

(2) The principle of compensation by the Power on which the prisoner of war depends (hereinafter referred to as "the Principle of Compensation") in international customary law.

The court examined this question, considering the concept as "the principle that the Power on which the prisoner of war depends shall be responsible for settling wages during the internment, claims of compensation arising out of the death or injury and labor-related accidents during internment, and other reparation for damages from excessively long internment or compulsory labor when and to the extent that the Detaining Power does not settle these matters." (However, the plaintiffs used this concept as one irrelevant to the question of whether the final bearer of the obligation to compensate prisoners of war is the Detaining Power or the Power on which the prisoner of war depends.)

The court held that "International customary law is international custom as evidence of a general practice accepted as law", referring to the Asylum case (ICJ, 1950), the Fisheries case (ICJ, 1951), the

North Seas Continental Shelf case (ICJ, 1969), and the Lotus case (PCIJ, 1927); that “general practice is factual usage which achieves generality through the accumulation of particular state practices”; and that “legal conviction indicates that a state performs a particular act, recognizing the practice as required as compulsory under international law” and explained these concepts in detail.

In addition, the court examined the principle in question in light of the constituent elements of international customary law. It stated that compensation by the Power on which the prisoner of war depends does not amount to a general practice of states, and denied the existence of a legal conviction, stating that the practice by some states of providing compensation to prisoners dependent on those states and payment by the Japanese government to prisoners who depend on it cannot be considered as conducted because of a notion that it is an international obligation. Finally, the court denied the existence of the principle of compensation by the Power on which the prisoner of war depends as international customary law.

(3) Self-executing character of international customary law.

The plaintiffs asserted that they could make a claim for compensation against the government of Japan because the Principle of Compensation had the status under municipal law as international customary law by virtue of Article 98(2) of the Constitution of Japan.

The court, in response to this assertion, recognized the municipal status of customary law on the basis of Article 98(2) of the Constitution of Japan, but stated that “for international customary law to have self-executing character under municipal law, ... its existence and content must be particularly clear ... The requirement and effect of the claim as the content of a legal norm must be clear and detailed,” especially when it gives the individual concrete claims in particular cases.

“Foreign states, in fact, do not recognize the municipal effect of international customary law without fulfilment of the necessary conditions.”

With respect to the existence of the Principle of Compensation as international customary law, the court cannot recognize the requirements and effect of it from state practice because the object,

method and content of compensation of different states vary and depend on the particular conditions of each state. Therefore, "In this sense too, [the court] cannot recognize the existence of the international customary law in question which the plaintiffs have asserted."

[Comment]

(1) The issue of this case concerns wages and compensation for Japanese prisoners of war interned in Siberia following the Second World War. As mentioned above, many claims were made, but the main issue is whether the Principle of Compensation came into existence as international customary law before the entry into force of 1949 Geneva Convention. Therefore, I will first discuss the issues concerning international customary law.

(2) The main issue of contention is whether the Principle of Compensation came into existence before the entry into force of the 1949 Geneva Convention since all but three of the Japanese prisoners of war bringing suit returned to Japan before the Treaty's entry into force with respect to the Soviet Union.

Discussing this issue, the court at first explained the constituent elements of international customary law very minutely. The court stated that they are "*consuetudo* (general practice)" and "*opinio juris* (legal conviction)", thus adopting the dualist approach. This approach, which is the generally recognized view, strictly limits the existence of international customary law. The content of each of these two elements is explained in a number of judgments of the International Court of Justice. Although the issue of the existence of customary rules has been considered several times by Japanese courts, this case is unique in that it makes clear the constituent elements of international customary law. It will be a leading case for municipal courts in the determination of international customary law.

Next, the court examined in detail whether the Principle of Compensation had come into existence as international customary law in the light of the above-mentioned constituent elements. The court defined the Principle of Compensation as "the principle that the Power on which the prisoner of war depends bears an obligation to pro-

vide payment of wages for labor during internment or claims to make compensation for death, injury or disability arising out of labor (including claims for damages for mental suffering), not settled by the Detaining Power” and examined whether each element (i.e., *consuetudo* and *opinio juris*) was present. Finally, the court denied the existence of the Principle of Compensation as a rule of international customary law at the time of the Siberia internment. In so far as the content of this principle is assumed to be as reported above, the decision of the court is valid.

However, there seems to be some difference between the concept that the court recognized and the one the plaintiffs put forward. As written in the decision, the plaintiffs “use [this concept] in the sense that they don’t refer to the question of whether the final bearer of obligation to pay prisoners of war is the Detaining Power or the Power on which the prisoners of war depend,”: the plaintiffs distinguished the issue of the obligation to make payment to prisoners of war from that of the party which was to initially pay. The expert witness for the plaintiffs seemed to consider that a joint debt to prisoners of war had come into existence. It is doubtful if the court answered this question raised by the plaintiffs.

However, their construction of theory seems to be very difficult. The plaintiffs adopted a unique view that “*opinio juris sive necessitatis* on the basis of humanitarian law” is required as one of the constituent elements of international customary law. This view is very different from the generally-accepted one, and is difficult to accept.

(3) The court next discussed the issue of the self-executing character of the Principle of Compensation as international customary law. This aspect of the decision is *obiter dictum* because, according to it, the Principle of Compensation did not come into existence as international customary law.

Concerning the internal application of international customary law, some states, such as the United Kingdom, require the transformation of international law into municipal law, but, in general, the Theory of Incorporation is accepted, which is that international customary law becomes a part of municipal law without special municipal measures such as adoption or transformation and is considered to

be executable under municipal law. In the application of international customary law in particular cases, however, coordination with municipal law is striven for.

Although international customary law is incorporated into municipal law through the Article 98(2) of the Constitution of Japan, the courts have not shown a clear standard of application in particular cases.

In this case, the court also recognized the incorporation of international customary law into municipal law. It further stated that the requisite for international customary law to be self-executing is that the requirements and effect of the claim are clear and detailed. In addition, it indicated as the elements of "clarity and detail" the determination of persons who are to receive compensation and of the content, method, and period of the compensation. The court seemed to interpret that the Principle of Compensation was not self-executable international customary law because these elements depended on the conditions of each state which could be varied.

This aspect of the decision, although *obiter dictum*, is distinctive because it indicates the requisites of self-executability of international customary law and its elements as a standard for future judgments.

(4) There are some significant issues concerning the 1949 Geneva Convention. The first issue concerns the retroactive application of this convention. All the plaintiffs but three asserted the retroactive application of the convention because they returned from the Soviet Union before its entry into force with respect to the Soviet Union. They attempted to establish this on the interpretation of Articles 141 (ratification or accession of the parties to the conflict), 134 (relation with the 1929 Geneva Convention on Prisoners of War), 135 (relation with the Hague Conventions respecting the Laws and Customs of War on Land of 1899 and 1907), 99 (the principle of *nullum crimen sine lege*) and 85 (acts committed prior to capture). But the court rejected all these claims. These provisions are stipulated for particular purposes and do not support reasoning that recognizes retroactive application. Therefore, we can agree with the decision of the court with respect to this issue.

The second issue concerns the treatment of the prisoner suspected of being a spy. The court indicated that the Soviet Union did not treat this individual as a prisoner of war and further stated that prisoner of war treatment was unnecessary. The issue is whether he could be treated as a prisoner of war in application of Article 85 of 1949 Geneva Convention because he was released after the entry into force of this Convention with respect to the Soviet Union.

In Article 85, in order to strengthen the protection of prisoners of war on the basis of experiences after the Second World War, prisoners of war who committed illegal acts (including crimes under municipal criminal law, crimes against peace, war crimes, and crimes against humanity) prior to capture, retain the benefits of prisoners of war, even if convicted. The Soviet Union and other Communist states made reservations that prisoners of war convicted under the law of the Detaining Power for war crimes or crimes against humanity were not eligible for protection under the convention. The rejection by the court of treatment of the convicted prisoner as a prisoner of war is based on this reservation made by the Soviet Union.

Can the failure to accord the convicted as a prisoner of war on the basis of the Soviet reservation to Article 85 be the basis for which Japan does not treat him as a prisoner of war? The Soviet reservation can only result in the release from the obligation of the Soviet Union to Japan. It is another question how Japan treats him. Considering the fact that Japan acceded to the 1949 Geneva Convention without reservation to Article 85, Japan is able to accord benefits as prisoners of war to Japanese prisoners who committed illegal acts prior to capture, even if convicted. Therefore, on the basis of the Soviet reservation, it is not valid not to treat the convicted prisoner as a prisoner of war.

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