7. International Law

A Case of Extradition of a Hijacking Offender.

Ruling by the Fifth Special Division of the Tokyo High Court on April 20, 1990. Case No. (*te*) 37 of 1990. A claim for hearing concerning extradition of a fugitive criminal. 726 *Hanrei Taimuzu* 77; 1334 *Hanrei Jihō* 35

[Reference: Act for the Extradition of Fugitive Criminals, Articles 2,4 and 10; International Covenant on Civil and Political Rights, Article 7; Convention relating to the Status of Refugees, Article 33.]

[Facts]

A, who was a passenger with his wife and child on a China International Aviation Company flight (with 223 crew and passengers) from Beijing bound for New York via Shanghai, hijacked the aircraft on December 16, 1989. In the face of great danger of crashing due to a lack of fuel, the aircraft was obliged to land at Fukuoka Airport in Japan. Soon after the landing A was detained by the Japanese authorities.

On February 22 of the next year the Chinese Government officially made a request to the Japanese Government for the extradition of A. The next day the Tokyo High Public Prosecutor's Office requested the Tokyo High Court to hold a hearing concerning extradition in accordance with Article 8 of the Act for the Extradition of Fugitive Criminals (hereinafter referred to as the "Extradition Act"). At the hearing A made the following assertions.

1. Although there is no clear provision in the Chinese Criminal Code concerning hijacking, under Article 79 a determination of the existence of an offense and punishment is possible under the most similar analogous provision (Article 107, concerning acts causing the physical destruction of aircraft). However, such an analogous offense provision is incompatible with the principle of legality (*nullum crimen sine lege, nulla poena sine lege*), so the requirement of double criminality is not satisfied, and thus this case falls

within the scope of Article 2(3) and (4) of the Extradition Act, which prohibits extradition.

2. As A had once been arrested and questioned concerning his participation in the Tiananmen Square Incident in Beijing, which occured on June 4, 1989 (however, his participation was not recognized as a fact by the Japanese procecutor), and his hijacking act was commited to seek political asylum in Formosa, his act is a political offense provided for in Article 2(1) of the Extradition Act, and thus, extradiction is prohibited.

3. The request for the extradition of A by China was made with the view to try and execute punishment of his other crimes, such as those committed at the Tiananmen Square Incident, so the request is in violation of the principle of speciality of the crime in extradition.

4. It is feared that if A were extradited to China, he would be tortured or subject to cruel treatment. Thus extradition by Japan to such a state constitutes a breach of Article 7 of International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant").

5. Since A is a refugee as defined in the Convention Relating to the Status of Refugees (hereinafter referred to as "the Refugee Convention"), extradition of A to China, where it is feared he would be persecuted, would be in violation of Article 33(1) of the Convention prohibiting the expulsion and forced return of a refugee.

[Ruling]

Extradition is permissible.

(1) Under the Act for the Extradition of Fugitive Criminals, the extent of the decision of the judicial organ requested to hold a hearing is "confined to whether individual cases to be heard contradict one of the provisions prohibiting extradition... not to make the final decision from a total point of view whether extradition is appropriate or not... which must be done by the administrative organ." The reason why there must be a decision by a judicial organ is that "it is noted that the problem needs judicial decision because

it is closely related to human rights".

(2) Concerning the requirement of double criminality (Article 2(3) and (4)), "if in the requesting state it is true that it is unanimously interpreted and applied as legitimate that such an act as hijacking should be punished," it is appropriate to consider that the requirement provided for in the Extradition Act is fulfilled, "so far as there is no positive contradiction with the legal order of the provisions of the Japanese Constitution or other statutes." "(The situation in China that the analogous offense provision may apply) should not be necessarily considered to be positively contradicting the legal order of the provisions of the Japanese Constitution or other statutes and to be wrongful," so this case does not fall within the provisions of restraint of Article 2(3), (4), and (6) of the Extradition Act.

(3) Among political offenses in general, while there is no dispute concerning purely political offenses, whether relative political offenses fall within the scope of political offenses provided for in the Extradition Act "must be decided case by case from sound common sense, after examining the individual circumstances of each case and establishing the strength of political character of the acts and whether the character is far stronger than that of ordinary crime or not." The standards for the decision are the political motive of the act, objective existence of a direct and useful relationship between the act and the political motive, the content and nature of the act, and the seriousness of its consequences keeping in balance with the motive intended; the act should be worth protection on the whole.

In this case, relevant facts in A's deposition including his record of political activities are doubtful, from the evidence contained in A's deposition, the testimony of witnesses, materials offered by Chinese authorities (including the testimony of his wife) and other evidence. In addition, concerning his activities at the Tiananmen Square Incident, "even if his deposition is true, he was merely an individual participant." Meanwhile, it must be noted when examining the standards mentioned above that hijacking act is "a violent crime which terrorize and poses risk to the lives to numerous passengers

and crew members the degree of which has been never imagined before."

The motive of this act was "to commit a crime mainly against civilians, almost without character peculiar to political offenses which aims to commit a crime against the state." "Objectively there is no relationship or usefulness with his political motives other than an effect of his escape." Furthermore, "it is clear that there is no balance between the seriousness of the consequences caused by his hijacking act and his ultimate aim to be obtained through the act. ··· Therefore, considering the relevant facts in this case and deciding on the whole according to sound common sense, the Court does not consider the act in this case to be a crime which should be protected under the Act for Extradition of the Fugitive Criminals because the political character of the act is far weaker than that of ordinary crime."

(4) In the matter of punishment for political offenses after extradition, the fact that the Chinese Government stated and clearly guaranteed that "the reason for seeking extradition is to punish the offender properly and according to the judical procedure of China for the serious crime of hijacking an aircraft, and the law to be applied is Article 1(a) of the Hague Convention [for the Suppression of Unlawful Seizure of Aircraft 1970], and Articles 79 and 107 of the [Chinese] Criminal Code, ··· and therefore he will be sentenced to not less than three years nor more than ten" and this was not a case of punishment by reason of a political offense, "should be reliable under international practice as an accountable engagement by a state to another," so that the Court does not consider that the request for extradition has the intention to convict for any political offense other than the offense for which extradition is requested." Therefore, this does not fall within the scope of Article 2(2) of the Extradition Act.

(5) Relating to Article 7 of the International Covenant on Civil and Political Rights, "although there is, of course, no breach against the Covenant in extradition itself when Japan should extradite A according to the request of China, even if Japan foresees that, when extraditing, there would arise treatment in viola-

tion of the purpose of the Covenant in the requesting state, ··· the Court should consider whether there would be consistency from the point of respecting the human rights of Japan, which has ratified the Covenant, when extraditing."

However, "'the case of prohibiting extradition of a criminal' provided in Article 10(1) and (2) of the [Extradition] Act means only the case provided in Article 2," and the determination of the existence of a breach of the Covenant, is "a matter to be judged and determined by the Minister of Justice." This is because as the consideration is a matter of foreseeing the future, it is rather suitable to administrative decision rather than a judicial determination based on evidence.

In addition, as mentioned above, since the Chinese Government officially guarantees that A will not be punished other than under Article 1(a) of the Hague Convention and Articles 79 and 107 of the Chinese Criminal Code, "the punishment inflicted on A after extradition to China will not be other than a limited penalty of not less than three years nor more than ten." Thus there is no problem in this point.

(6) Concerning the Refugee Convention Article 33(1), "although the Refugee Convention very clearly provided protective measures for refugees within member states,... the Convention has no provisions relating to permission for entrance and the stay of refugees, and on the determination of that point, traditional state sovereignty is free to give asylum to them." Unless there is an obligation to protect them under treaties or domestic law, it never constitutes a breach of international law either to grant asylum or not to a person who, in his home state, had been pursued by authorities for some reason and escaped to another state's territory. Furthermore, as A can not be considered to be a person provided for the Convention, there is no reason to consider that this is a case of extradition not being permissible.

(7) Consequently this falls within the case of extradition being permissable.

[Comment]

(1) This is the first case in which the application of the provision concerning 'political offenses' of the Act for the Extradition of Fugitive Criminals was disputed in Japanese court. In fact, there have been numerous cases in the past in which the concept of 'political offense' was examined in Japanese courts, but in all these cases the issue was not one of procedure of the above legislation, but was concerned with the concept of political offenses in general international law, specifically whether the principle of non-extradition of political offenders is established under customary international law as an obligation of the State (for example "Yoon Su Kill case", 14 Japanese Annual of International Law (1970) pp. 146–189; 18 J.A.I.L. (1974) pp. 171–175; 20 J.A.I.L. (1976) pp. 127–137). However, in the present ruling the Court considers even further the substantial problems of the concept of the political offense and standards of determination, and this ruling is not only a leading case in Japan, it is also significant as state practice concerning international law.

Althogh there are various issues in this case, the decisions of which must be regarded as precedents in Japan, among others, the principal issue of 'political offenses' will be reviewed below.

(2) Concerning the concept of political offense, as indicated in the ruling of this case, cosistency can not be found in either state practice or in scholarly writings. Nevertheless, despite these conditions, currently a number of significant trends which can not be ignored can be seen among the mass of domestic legislation and judicial decisions. Particularly significant are several cases from the United Kingdom and Switzerland (Yukio Shimada, A Review on the Concept of Political Offences in International Law, 21 *Waseda Hogakukaishi*, 1 (1971) 9–31).

In this case three standards were considered to be decisive if a relative political offense can be considered a political offense for the purpose of non-extradition: 1) the political character of the motive of the act; 2) the direct and useful relationship between the act and its motive; 3) the content, nature and seriousness of its effects.

It seemed that the Court used a theory elabolated in Switzerland (the Theory of Predominance) (Mamoru Miura, Political Offense under the Act for the Extradition of Fugitive Criminals, 726 *Hanrei Taimuzu* 51 (1990) 55–56. There is also a significant opinion that the reasoning of British cases should be adopted. Soji Yamamoto, The Case of Extradition of the Criminal of Suppression of Unlawful Seizure of China Aircraft, 980 *Jurisuto* 251 (1991) 253).

In contrast to these conditions of the standards of political offenses, there appears a trend in both international and domestic law to exclude certain types of offense from the scope of political offenses. For example, provisions excluding crimes causing injury to the head of state from political offenses (the so-called Belgium clause) have long been recognized, while recently treaty provisions can be seen which do not recognize certain acts as political offenses, such as genocide (Genocide Convention (1951), Article 7), terrorist acts (European Convention on the Suppression of Terrorism (1971), Article 1) and serious offenses (Supplementary Treaty concerning the US-UK Extradition Treaty (1980), Article 1). Such provisions significantly restrict the discretion of governments, which was previously recognized, to make decisions concerning political offenses, and, for these serious offenses, protection is not granted to the offender without holding a hearing in each individual case.

In 1952 the Swiss Federal Court handed down a decision in which it did not allow extradition, recognizing hijacking as a political offense (In re Kavic, Bjelanovic and Arsenijevic). Following that, however, with the increase of hijacking incidents, the need for preventing hijacking was addressed in the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention. Although provisions not to recognize hijacking as a political offense were suggested during the preparatory work of these conventions, this was not accepted. Even though there was awareness that hijacking was offense which required an international response, international agreement on absolute denial of protection of hijackers as political offenders could not be reached. Nevertheless, after these conventions, various domestic legislations and regional and bilateral treaties which denied the political character of hijacking

appeared (for example, Switzerland (1981), Australia (1988), US-Canada Extradition Treaty (1971) Article 4(2), European Convention on the Suppression of Terrorism (1977) Article 1(a) and (b), Supplementary Treaty concerning the US-UK Extradition Treaty (1986) Article 1(a)). It can be said that there is a trend that the possibility of hijacking being considered to be a political offense is increasingly small.

In Japan, there is no statute concerning the political character of hijacking and no treaty with such content has been concluded. Therefore, a decision concerning the political character of hijacking must be made individually for each case. On this point, the Court decided, "when a civil aircraft is hijacked, a serious offense which places a large number of people in extreme risk, the balance [between the political motive and the method of achiving it] is lost, making it very difficult to grant protection as a political offender." In consideration of the international trend mentioned above, this decision is proper. It is doubtful, however, if this ruling can be interpreted as absolutely denying the political character of hijacking. This decision is the result of consideration of the standards of relative political offenses, and it can be considered that there remains a need for examination of individual cases (Toyo Astumi, A Note concerning this Ruling of the case, 726 *Hanrei Taimuzu* 70, op. cit., 75). In any case, it can be said that, practically speaking, it is virtually impossible for a hijacker to receive protection as a political offender. The strict decision of the Court towards this violent crime, from an international point of view, should be highly evaluated.

(3) Great attention was paid to this case both in and outside of Japan, as it concerns the political asylum of a figure who is (believed to be) related the Tiananmen Square Incident in China. There are many views which are severely critical of Japan's overall attitude as expressed in the ruling by the Tokyo High Court, from the stand point of considering A as a significant figure in the incident, of expecting Japan's apparent critical attitude against the incident, or of being concerned for A's human rights to protect from China's domestic situation. From a legal point of view, concerning the issue of 'political offense', however, the following two points

concerning this ruling by the Tokyo High Court should be indicated: 1) the ruling of this case is the first one by Japan's court to clarify the concept of 'political offense' under the Extradition Act, and therefore it should be treated as a leading case in the future; 2) it is a case that indicated the Court's severe attitude towards the crime of hijacking. The significance of this is fairly high, that is if it had been the opposite result, the risk of increased hijacking for political reasons would have been high. In this point, this ruling should be highly evaluated.

* *

After A was turned over to Chinese authorities, on July 18, 1990, he was sentensed to 8-year imprisonment and 2-year deprivation of political rights by the Beijing Central People's Court. China's official guarantee was fulfilled, and no problems of international law arose for either Japan or China.

Prof. TOKUSHIRO OHATA
AKIRA SAKOTA