which eliminate substantially the spirit in which the law secures these rights must exist for the disadvantageous treatments to be invalid because of a violation of public order.

(2) Pay claims during a no working period:

The Supreme Court decides that the lack of work caused by Pre-Childbirth and Post-Childbirth Leaves and the measures for reducing the working hours for the child care is permitted to be treated as an absence when the amount of bonuses is calculated because Pre-Childbirth and Post-Childbirth Leaves and the measures for reducing working hours for the child care are not obligated to be paid in labor law.

In labor law, lack of work in which a wage has been secured is only Paid-Leave and the first three days of leave caused by industrial accidents (Art. 76 of the Labor Standards Law).

It can be said that the position of the Supreme Court decision that the pay claim is not generated in principle during a no working period when it is not obligated to be paid will confirm the principle of no work no pay.

9. International Law and Organizations

Japan v. X
Tokyo High Court, March 29, 2004
Case No. (*te*) 20 of 2004
1854 HANREI JIHO 35, 1155 HANREI TAIMUZU 118

Summary:

In an extradition hearing involving a Japanese national charged with economic espionage in the United States, if no probable cause is found to suspect that he has committed an offense under U.S. law, no probable cause is established, under Article 3 of the Japan-U.S. Extradition Treaty and Article 2, Paragraph 6, of the Fugitive Criminal Extradition Act of Japan, for the commission of the offense for which the extradition is requested.

Reference:

(1) Treaty on Extradition between Japan and the United States of America (The Treaty).
(2) Fugitive Criminal Extradition Act of Japan (The Act).

Facts:

The accused "X" had worked at the Cleveland Clinic Foundation (CCF) in Ohio, USA, since 1997, conducting research on genetic Alzheimer's disease at its Learner Research Institute. In June 1999, he started to work part time also for the Institute of Physical and Chemical Research (Riken), founded by the Japanese government. Having left CCF in September that year, he became a team leader of Riken's Brain Science Institute. While he was with CCF, he took some DNA samples and cell line reagents from the laboratory and left them with a Japanese associate professor of the University of Kansas, and moreover destroyed other research materials. Upon the assumption of the new post at Riken, X transferred the materials from the associate professor to his new office.

In May 2001, a federal grand jury in Cleveland indicted X and his alleged accomplice for violation of the Economic Espionage Act and interstate transportation of the stolen items, as well as perjury relating to these offenses. The FBI arrested the accomplice in the US, while X had already left for Japan. The charges against the accomplice were dropped subsequently in a plea bargain, in which he pleaded guilty to perjury and was fined $500.

In March 2002, the U.S. Department of Justice requested Japan, on the basis of the Treaty, to extradite X for the above two offenses and conspiracy relating to them. In January 2004, the Ministry of Justice of Japan reached a conclusion that X could be extradited on account, *inter alia*, of larceny, destruction of property and forcible obstruction of business. The minister accordingly ordered the director of the Tokyo High Public Prosecutors' Office to ask Tokyo High Court to hold an extradition hearing pursuant to Article 4, Paragraph 1, of the Act. In February, the Office having obtained an arrest warrant took X into custody.

The prosecutor argued that, while there was no offence in Japanese law equivalent to economic espionage under the U.S. law, X could be

extradited on account of larceny and other offenses. While X admitted that he had taken the materials in question out of the CCF laboratory, he insisted that they belonged to him and that he had no intention to benefit Riken through his conduct.

The main issues in this case were as follows:

(1) What is the meaning of an offense for the commission of which there is probable cause to suspect under Article 3 of the Treaty?

(2) Can it be established that there was indeed probable cause to suspect that X had committed the offence in that meaning?

(3) In case the above question is affirmatively replied, can it be concluded that an act that would constitute the offense for which extradition is requested is punishable under the Japanese law, as prescribed in Article 2, Item 5, of the Act (i.e., the "dual criminality" requirement)?

Opinion:

This case belongs to those where the fugitive criminal cannot be extradited.

(1) In examining whether a fugitive criminal can be extradited, the question must be asked whether there must be probable cause for suspecting the commission of the offense under the laws of the requesting country, or, whether it is sufficient to prove such probable cause under the laws of the requested country. Article 3 of the Treaty and Article 2, Item 6, of the Act treat equally the requirement that there is probable cause to suspect the commission of the offense and the requirement that the person in question was convicted by a court of the requesting party. Moreover, Article 8, Paragraph 2 (c), of the Treaty requires, as documentation to accompany the extradition request, "the texts of the laws describing the essential elements and the designation of the offense for which extradition is requested." In the light of these provisions, "the offense for which extradition is requested" in the Treaty and "the act that would constitute the offense for which extradition is requested" in the Act should be interpreted to mean an offence or an act essentially under the laws of the requesting country, and, in certain circumstances, to include those under the laws of the requested country. Therefore, unless such probable cause is found at least under the laws of the requesting country, the probable cause requirement under Article 3 of the Treaty and Article 2, Item 6, of

the Act is not met.

(2) Next, it must be examined whether there is probable cause to suspect that X has committed the offense for which extradition is requested in the above-mentioned meaning. The documents submitted by the prosecutor, which were prepared on the basis of the allegations of CCF, contain no evidence for inferring that such acts of X as removing DNA samples would constitute the economic espionage prohibited by the U.S. law. Judging from the circumstances at that time, the assertion of X that he had removed the materials from the laboratory and destroyed them in order merely to annoy one of his subordinate researchers with whom he was not in good terms is persuasive. Accordingly, it cannot be concluded that there is probable cause to suspect under the Economic Espionage Act that X removed and destroyed these materials with the intention or knowledge that they would benefit Riken. As for the alleged offense of interstate transportation of the stolen items, it is not possible, as the prosecutor himself has admitted, to calculate the commercial value of the materials. It cannot thus be concluded that there is probable cause to suspect that the value of the materials was more than $5,000, the value at which the offence applies. The same conclusion applies, consequently, to the alleged conspiracy involving the two offenses.

(3) For these reasons, it cannot be concluded that this is a case where there is sufficient evidence to establish probable cause to suspect that X has committed the offense for which extradition is requested. Therefore there is no need to examine the remaining issues.

Editorial Note:

This is a case where a Japanese scientist who worked at an institute in the U.S. removed and partially destroyed research materials before he moved to another institute in Japan, and then was charged with economic espionage and related offenses. There was no offense of economic espionage in Japanese law at that time, and the U.S. request for extradition of the accused was not granted. (Subsequently, in 2004, an amended Unfair Competition Prevention Act, which criminalizes leaking of business secrets, entered into force.)

Research products and materials relating to Alzheimer's disease and other hopeful fields have been considered to be highly valuable as

intellectual property, and many states are advancing national policies to protect these rights. Private companies and institutions are also paying greater attention to the handling of such materials. In Japan, however, developments in this area are still immature, and there are many organizations with no clear rules concerning their legal status and handling.

So far, Japan has concluded extradition treaties only with the United States and the Republic of Korea. The Japan-U.S. extradition treaty entered into force in 1980, and, since then, Japan has handed over 31 fugitives, including 8 Japanese. As for the extradition of its own nationals, the Treaty and the Act provide for their non-extradition in principle, but Japan may extradite its own nationals in certain cases (Article 5 of the Treaty and Article 2, Item 9, of the Act). This is the first case in which Japan has rejected a request from the U.S. under the Treaty, and it has thus caused controversy, including from the viewpoint of judicial cooperation.

It is generally pointed out that, for the extradition of a fugitive criminal, "dual criminality" shall be required in the sense that the acts for which extradition is requested must be regarded as criminal under the laws of both the requesting and the requested countries (e.g. Tokyo High Court Decision, March 30, 1989, 703 HANREI TAIMUZU 284). This is a rare case, where the question was asked whether there must be probable cause for suspecting the commission of a crime under the law of the requesting country, or whether it is sufficient to prove such probable cause under the laws of the requested country. The court concluded that probable cause must be found under the laws of the requesting country on both substantive and procedural grounds. From the substantive point of view of human rights protection, it is required that the person sought is likely to be convicted by a court of the requesting country; while, procedurally, the Treaty requires the texts of the laws to be attached to the extradition request describing the name of the offense committed and the requirements for constituting such an offense.

With regard to these issues, the prosecutor argued that there was the need to establish probable cause under the laws of the requested country only, based on the following reasoning: (1) Article 2, Paragraph 6, of the Act requires the court to examine under the Japanese law "the

act" that would constitute the offense for which extradition is requested, and not "the offense" itself, thus avoiding the difficulties for the court to interpret foreign laws. (2) In examining the dual criminality requirement, the acts concerned should be treated as natural and social facts, because the elements which the requesting State requires for constituting the offense for which extradition is requested are often different from those required by the requested State. (3) Article 4, Paragraph 1, Item 2, of the Treaty mentions prosecution and conviction by the requested Party for the offense for which extradition is requested as one of the reasons for rejection of extradition. (4) Article 3 of the Treaty clearly refers to "the laws of the requested Party" as applicable law in finding probable cause of the offense.

Against these arguments, the court held as follows. (1) While the court must find out whether a fact exists or not, it is sufficient to examine the so-called normative facts which involve certain legal interpretation only within a certain reasonable range of interpretations on the basis of related documents or judicial precedents, without necessarily requiring strict legal interpretation. (2) There is a leap in logic between arguing, on the one hand, that the court should examine whether an act which is regarded as an offense under Japanese law can be found within natural and social facts, and concluding, on the other, that there is no need to look into the facts corresponding to the elements constituting the offense required by the requesting country. (3) The purpose of Article 4, Paragraph 1, Item 2, of the Treaty is to focus first on the offense for which extradition is requested under the laws of the requesting country, and then, on the basis of that finding, to look into the relationship between that offense and the offense being prosecuted by the requested country. (4) The phrase "according to the laws of the requested Party" in Article 3 of the Treaty modifies the phrase "there is probable cause to suspect," which merely means that the scope and extent of the burden of proof concerning the probable cause of the offense must be judged under the laws of the requested country.

In sum, the court ruled against the extradition of X on the ground of lack of probable cause for committing the crime in question as a preliminary issue, before examining the question of dual criminality for economic espionage, which had been expected to become the main issue.

This ruling could be criticized for the involvement of the requested country's court at the stage of the extradition request in a judgment which essentially the court of the requesting country should have undertaken. This criticism, however, should be regarded as *de lege ferenda*, since the existing treaty and statute require the establishment of such probable cause before granting extradition. It was also pointed out that the decision in the present case has raised the evidentiary standard for granting extradition. However, the probable cause requirement under the laws of the requesting country has always been applied as a matter of course to extradition requests, and therefore, it seems unlikely that future examination of extradition cases in Japan will become much stricter and more difficult after this case.

Since there is no appeal process in the extradition procedure, the non-extradition has been established, and the U.S. authorities appear to have given up receiving X, though the possibility remains for X to be arrested if he travels to the United States or other countries. As crimes become more and more internationalized, states have enacted new criminal laws to protect their national interests. Under such circumstances, discussion will be bound to continue on how to maintain the proper balance between the protection of human rights of suspected criminals and the requirement of international judicial cooperation.

X et al. v. Japan

Tokyo High Court, February 9, 2004[1]
Case No. (*ne*) 5850 of 2002

Summary:

Claims for compensation by nine Taiwanese women who were forced to serve as "comfort women" by the Japanese Imperial Army during the Second World War are denied. The demand for an official apology is also rejected.

[1] The plaintiffs appealed this Case to the Supreme Court. On February 25, 2005, the Supreme Court rejected the appeal.

Reference:

(1) State Redress Law and its Annex.
(2) Civil Law of Japan.
(3) Slavery Convention.
(4) Forced Labour Convention (ILO Convention No.29).
(5) International Convention for the Suppression of Traffic in Women and Children.
(6) Law of Civil Procedure of Japan.

Facts[(2)]**:**

This case concerns the claims of nine women living in Taiwan who were allegedly taken away to other places inside or out of Taiwan as "comfort women" by members of the Japanese Imperial Army during World War II. They demanded that the government of Japan pay compensation and give an official apology for the injuries caused while they were confined and systematically and continuously forced to have sexual relations, on the basis of both international and municipal law.

"Comfort women" were those who were forced to have sexual relations with soldiers at the so-called "comfort stations" which were set up in the war zones controlled by the Japanese Army. The plaintiffs pointed out that such facilities were established without exception in the areas where Japanese troops were sent after the Sino-Japanese war, notably in China, Hong Kong, Indochina and the Philippines. Although Taiwan was a colony of Japan during the War and it never became a battleground, Japan established a command post and hence comfort stations were there. The plaintiffs alleged that they were forced to have sex with officers inside such facilities or under the control of the Army. The plaintiffs thus claimed compensation in the amount of 10,000,000 yen for each of them and demanded official apologies from the defendant for the internationally wrongful acts, which constitute war crimes and specifically

(2) The following summaries of "Facts" and "Opinion" of the court are based mostly on those contained in the judgment of October 15, 2002 by Tokyo District Court, as published in HANREI TAIMUZU, no.1162 (15 December 2004) pp.154–166, since in rejecting the appeal from that judgment, the present court has quoted at length the main parts of the facts and opinions given by the former court.

violate the Slavery Convention, the Forced Labour Convention, and the International Convention for the Suppression of Traffic in Women and Children.

The court of first instance rejected these claims of the plaintiffs (Tokyo District Court, October 15, 2002). The plaintiffs appealed the case to the present court.

Opinion:

1. Claims based on international law.
(1) Right of individuals to file claims against States based on internationally wrongful acts:

The plaintiffs rely on three international conventions as providing bases for their claims.

First, with regard to the alleged violation of the Slavery Convention, it is noted that the Convention imposes the obligations on states parties to undertake: to prevent and suppress the slavery trade and to bring about progressively the complete abolition of slavery in all its forms (Art. 2); to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves (Art. 3); and to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions (Art. 6). It thus provides for the obligation of states, and there is no provision which would give individual victims the right to claim compensation directly from a foreign State. It cannot therefore be concluded that this Convention allows the individuals to file claims for injuries at the national court of the wrongdoing state.

Secondly, the Forced Labour Convention stipulates that "forced or compulsory labour of all kinds shall be remunerated in cash at rates not less than those prevailing for similar kinds of work..." (Art. 14), and that the laws and regulations relating to workmen's compensation for accidents or sickness for normal workers shall be equally applicable to workers under forced or compulsory labour (Art. 15). However, this Convention cannot be considered to deal also with injuries which could be caused by an act prohibited by the Convention. Accordingly it cannot be concluded that the Convention enables the plaintiffs to claim compensations for the injuries which are not part of their remuneration, or it

confers the plaintiffs the right to claim any payment as compensation for the forced labor which is wrongful under the Convention.

Thirdly, with respect to the International Convention for the Suppression of Traffic in Women and Children, it prohibits any act to procure, entice, or lead away a woman or girl under age for immoral purposes (Arts. 1 and 2), and obliges the parties to enact necessary legislation to punish these offences according to their gravity (Art. 3). There is, however, no provision which grants individuals the right to file claims for compensation for injuries against a state which violates the Convention. The fact that state responsibility arises from a violation of treaty obligations does not automatically mean that the state would be directly liable for compensation to individual victims.

Lastly, the Hague Convention respecting the Laws and Customs of War on Land and its Annex containing the Regulations Concerning the Laws and Customs of War on Land provides that a belligerent party which violates the provisions of the said Regulations shall be liable to pay compensation (Art. 3). However, this article is interpreted as providing only for the international responsibility of states which violates the annexed Regulations for the injured States. In other words, this provision is aimed at ensuring compliance with the said Regulations by belligerent troops. It may also be pointed out that the Convention does not specify to whom the compensation should be paid. In addition, international law regulates that the relationship between States and individuals cannot *ipso facto* be treated as subjects of rights and duties. For these reasons, "compensation" under article 3 of the Hague Convention can only be interpreted to mean that of one state vis-à-vis another state. It cannot be concluded therefore that the Convention grants individuals the right to claim compensation under international law.

(2) Claims of injured individuals and State responsibility of the injuring State:

In international law, when an individual's rights or interests are violated by a foreign state, the individual is expected to be protected by the state of his/her nationality indirectly through the principle of diplomatic protection. The injuring state is thus obligated to redress the injury for the latter state, and will be relieved of its international responsibility by

fulfilling that obligation. The specific measures to be taken by the injuring state and the rights or benefits to be given to the injured individual would be settled through bilateral negotiations and decisions taken in the process under municipal law. It cannot be concluded, therefore, that the injuring state is always obligated to make reparation to the injured individual as part of its duty to relieve itself of its state responsibility.

2. Public acts under the Civil Law.

(1) Principle of Non-responsibility, or Sovereign Immunity:

The State Redress Law provides for the reparation for injuries caused by the exercise of public acts of the state and local governments. However, it further provides that the previous rules apply to the injurits caused by such acts that had taken place before the enactment of the Law. The relevant old rules, i.e., Article 16 of the original Administrative Justice Law, provided that the administrative courts shall not accept compensation claims for injuries. In addition, there is no express provision in the Civil Law relating to compensation for injuries caused by the public acts of the Government. For these reasons, the responsibility of the Government for any wrongful acts under the Civil Law has consistently been denied.

(2) The exclusion period under the statute of limitation:

According to Article 724 of the Civil Law, the right to file claims for compensation for injuries caused by wrongful acts lapses after 20 years from the date of the wrongdoing. It is reasonable to believe that the purpose of this rule is to fix the legal relationship concerned after the lapse of a certain period of time, irrespective of the knowledge on the part of the injured person, and thus provides for the so-called exclusion period for filing claims for compensation. Therefore, even if the Defendant's responsibility were established for wrongful acts alleged by the Plaintiffs, the right of the Plaintiffs to file claims has ceased to exist under Article 794 of the Civil Law.

Editorial Note:

Several lawsuits have been filed in recent years involving the issues of so-called "comfort women." They include the cases whose judgments were rendered by Hiroshima High Court on March 29, 2001, as well as

those by Tokyo High Court on December 6, 2000, November 30, 2000, and August 30, 1999. Compensation claims in most of such cases were denied. A rare exception is the judgment of Yamaguchi District Court on August 27, 1998, where the court ordered the Government of Japan to pay compensation to three Korean "comfort women" for the injury caused by the Imperial Army. The present court, having examined legal issues similar to these precedents, denied the claims brought by the plaintiffs. These precedents and the present case share certain issues of both municipal and international law.

There are several developments which have contributed to the increase in the number of lawsuits relating to war compensation, including "comfort women" issues, in the 1990s, almost half a century after the end of World War II. One of such developments is the discussions at the United Nations: In 1992, a NGO raised this issue in the context of the question of forced disappearance in the Commission on Human Rights. In August of the same year, the Commission adopted a resolution to appoint Special Rapporteurs to investigate this issue. The Special Rapporteurs then submitted several reports, including notably those submitted by Gay McDougal and Radhika Coomaraswamy. Since then, this issue has continued to be taken up by the Commission.

In discussing the three treaties invoked by the plaintiffs, the court consistently pointed out that they contain no specific provision to confer any right on individuals to claim compensation directly from a foreign state. This view is also shared by the Japanese Government with regard to a series of war compensation cases including those involving "comfort women." As the court stressed, the subjects of international law are basically states, and remedies for individuals injured by a foreign state may be recognized only in cases where states agree to provide specifically for such a possibility. Recent examples of such provisions include Article 13 of the European Conventions on Human Rights, Articles 2 (3) and 14 (6) of the Covenant of Civil and Political Rights, and Article 6 of the International Convention on Elimination of All forms of Racial Discrimination.

It should be noted, however, that such a view has not always been supported by all international lawyers. It is thus argued by some scholars that even in the case where there is no explicit treaty provision, the

duty of states to provide remedies under municipal law for violations of human rights norms is implicitly required in human rights treaties, and individuals are accordingly expected to receive remedies in some way (T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW (1989), pp.138–139).

The present court has also held that the only way to protect the rights of individuals in the absence of specific treaty provision is through the exercise of diplomatic protection. Diplomatic protection involves the right of a state to demand that another state through diplomatic means takes appropriate remedial measures when the latter State causes an injury to the person or property of the former state's nationals. The court underlined such a function of diplomatic protection, and held that the injury caused to the individuals should be dealt with by the states of their nationality in accordance with the principle of diplomatic protection.

Similar reasoning has been adopted in other cases. However, some authors have taken different positions. They stress the point that the legal interests to be secured by diplomatic protection are those of the state, which is quite different from those of the individuals concerned, as pointed out in the judgment in the Chorzów Factory Case in 1927 (Germany v. Poland, Jurisdiction, *PCIJ, Ser.* A, No.9, p.21). It was thus argued that the interest of the injured individual is quite separate from that of their state (Yoshio Hirose, *The Right of Individuals to File Claims for War Damage under International Law*, HOGAKU KENKYU, No.69 (2000), p.171).

It is generally accepted that the decision to exercise diplomatic protection is left to the state. There are, however, some postwar compensation cases which tried to go further and refer to a need to fill the gap made by a failure to remedy the individual's injury through such diplomatic protection. For example, the judgment by Yamaguchi District Court on April 27, 1998, pointed to a "political duty" of the Diet members to initiate some legislative measures for that purpose. Similar views were expressed by Tokyo High Court on August 26, 1985, and Hiroshima District Court on July 9, 2000, encouraging the Diet to take additional measures including new legislation.

In the present case, the court held that, as the State Redress Law does not provide specifically for the protection of the injured individuals con-

cerned, no concrete duty is recognized for each of the Diet members to initiate new remedial measures. On the other hand, the above-mentioned Yamaguchi District Court had held that the enactment of a new law which would allow compensation for the victims of comfort women was a duty emanating implicitly from the Constitution. The court added that such obligations arose from the policy statement of the Japanese Government to "seriously consider how the Government can express an apology." It appears likely that these two opposing positions adpted by different courts would affect to the similar cases filed in the future. It is hoped, however, that some kind of solution, be it judicial, political or moral, be found before it is too late for the victims.