

# JURISDICTIONAL BRIEFS FOR INTERNATIONAL JUSTICE IN ASIA

## Japan



The following document surveys legal avenues that *may* be available to survivors of international crimes, specifically in **Japan**. It includes a summary of the Japanese legal system and a review of potentially useful legislation and case law.

**Nothing in this brief constitutes legal advice or an endorsement of particular legal services.**

Please seek advice from legal professionals qualified in the relevant domestic jurisdiction.

Links to translations in English may not be official. Please consult versions of legislation or decisions in their original languages. Regarding case law, given the difficulty of locating court decisions in English, this brief relies in part on published summaries by scholars that are cited throughout.

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# Practitioner Summary



## Both Treaty Law And Customary International Law Are Recognised In Japanese Domestic Law.

Under Article 98(2) of the Japanese Constitution, 'treaties concluded by Japan and established laws of nations shall be faithfully observed'. In practice, courts have preferred locating rights and obligations in domestic, rather than in international, law. Nevertheless, there are many judicial decisions which have either directly or indirectly applied international law.

## Japan Is A Rome Statute State Party But Has Specifically Criminalised Only A Few Atrocity Crimes.

In 2004, Japan criminalised four 'grave breaches' that were not addressed by the existing Penal Code in order to give effect to obligations under the four Geneva Conventions and Additional Protocol I. This predates Japan's accession to the Rome Statute in 2007. As a Rome Statute State Party, the Government of Japan determined it did not need to enact distinct domestic crimes to comply with its obligations. Instead, existing offences under the Penal Code are presumed to be able to encompass most Rome Statute crimes.

## The Penal Code Allows For Extraterritorial And Universal Jurisdiction For Some Crimes.

Under Article 4-2, the Penal Code can apply to anyone who commits specified crimes outside the territory of Japan which Japan is obligated to punish by a treaty. Japan has not created new crimes, preferring instead to interpret existing offences in such a way as to give effect to the treaty obligations. This does not mean universal jurisdiction may only be applied specifically-defined crimes (eg the crime of 'torture' which does not exist in the Penal Code), but rather that it applies to any crime the prosecution of which, in its content, is being used to address the conduct prohibited by the treaty (eg 'torture' reinterpreted as the existing crime of assault). Researchers were unable to locate any cases where Article 4-2 was invoked in the prosecution of atrocity crimes.

## Some Rights Under The Constitution Apply To Non-Nationals And Compensation For Official Decisions That Cause Harm May Be Pursued.

Japan's Constitution protects several rights—many of which are extended to non-Japanese nationals. Of particular note, Article 17 states that 'every person' shall have the right to sue for redress of harm caused by unlawful acts by public officials. The 'State Liability Act' gives effect to this right. This could theoretically open the possibility to bring cases on behalf of survivors of atrocity crimes under the State Liability Act for harm resulting from Japanese State decisions (eg procurement or investment in conflict-related corporations). However, all evidence and pleadings must be given in Japanese, making it a challenge for non-nationals to mount a case.

# Legal System

The Constitution of Japan (the Constitution) provides for the separation of government powers between three independent branches: the National Diet (the Diet; the legislature), the Cabinet (the executive) and the Judiciary. The Constitution limits the power of the branches through a system of checks and balances.

## Japanese Law

The Japanese legal system is a civil law system; therefore, most of Japanese law derives from statutory law. Laws and regulations in Japan can be classified (link at 27) into six major categories: the Constitution, the Civil Code, the Commercial Code, the Penal Code, the Code of Civil Procedure, and the Code of Criminal Procedure. Japanese statutes are enacted by the Diet, and Japanese regulations—including cabinet office ordinances and ministerial ordinances—are established by other governmental organs. Article 98(1) of the Constitution clarifies that the Constitution is superior to statutes. Statutes enacted by the Diet take priority over regulations.

Chapter III of the Constitution enshrines important protections for civil and political as well as social and economic rights. Chapter III is entitled 'Rights and Duties of the People', suggesting that rights may only be owed to 'the People' or Japanese nationals. Some rights reflect this in their wording; for example, Article 15 states: '*The people* have the inalienable right to choose their public officials and to dismiss them' (emphasis added). However, other rights are framed more inclusively; Article 31 states: '*No person* shall be deprived of life or liberty...except according to procedure established by law'. These inclusively drafted rights have been upheld for non-Japanese nationals by the Grand Bench of the Supreme Court.<sup>1</sup>

The principle of pacifism enshrined in Constitution Article 9 was thought to prevent Japan from enacting any legislation to permit the prosecution of war crimes.<sup>2</sup> This changed in 2003 with Article 21(2) of the Act on the Peace and Independence of Japan and Maintenance of the Nation and the People's Security in Armed Attack Situations etc (in Japanese only) requiring the Japanese government to prepare legislation for 'the effective implementation of international humanitarian law'.<sup>3</sup>

Although based primarily on statutes, Japanese law considers case law to be an important source of law. Precedent, particularly of the Supreme Court, 'fills the gaps' in statutes and subsidiary regulations. A primary example of this is in tort liability, where case law has helped define 'concepts of negligence, causality, and unlawfulness'.<sup>4</sup>

The doctrine of *stare decisis* 'has no explicit basis in Japanese law'<sup>5</sup> and case law—both *ratio decidendi* and *obiter dicta*—is considered 'supplementary' rather than binding.<sup>6</sup> However, judges usually follow the decisions of the Supreme Court and courts higher in the court hierarchy.

1. Saikō Saibansho Minji Hanrei-Shū vol 32, no 7, 1223 (the McReen case) as cited in Shin Hae Bong, 'Japan' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Dinah Shelton ed) (Oxford University Press 2011) 373–375. Please also see the Appendix.

2. Jens Meierhenrich and Keiko Ko, How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan, *Journal of International Criminal Justice* vol 7:2 (May 2009) 233–256, 238.

3. Ibid 240.

4. Hiroshi Oda, *Japanese Law* (Oxford University Press 2009) 42.

5. Ibid 43.

6. Ibid 44.

## RELEVANT CONSTITUTIONAL PROVISIONS

(Emphases added)

### **Article 14**

*All of the people* are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

### **Article 16**

*Every person* shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters; nor shall any person be in any way discriminated against for sponsoring such a petition.

### **Article 17**

*Every person* may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through an illegal act of any public official.

### **Article 18**

*No person* shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

### **Article 22**

...Freedom of *all persons* to move to a foreign country and to divest themselves of their nationality shall be inviolate.

### **Article 31**

*No person* shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

### **Article 32**

*No person* shall be denied the right of access to the courts.

### **Article 36**

The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

### **Article 39**

*No person* shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

### **Article 98(2)**

The treaties concluded by Japan and established laws of nations shall be faithfully observed.

## Court System

The Japanese court system can be roughly categorized into three tiers: (i) the Supreme Court, (ii) the High Courts, and (iii) the district courts, the family courts and the summary courts.

Located in Tokyo, the Supreme Court has judicial review authority and has a mandate to assess whether laws enacted by the Diet are compatible with the Constitution. The Supreme Court's judicial review authority is granted by Article 81 of the Constitution, which states, '[T]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act'.

The second tier of Japanese courts consists of the High Courts. There are eight High Courts with an Intellectual Property High Court as a separate branch of the Tokyo High Court. These courts have jurisdiction over appeals on rulings by the third tier of courts.

The third tier of Japanese courts consists of district courts, family courts<sup>7</sup> and summary courts. There are 50 district courts and 50 family courts. District courts are normally the courts of first instance for civil, administrative, and criminal cases. District courts also have jurisdiction over appeals against summary court judgements. The summary courts are the most accessible courts in Japan, with jurisdiction over civil cases in which the disputed amount does not exceed 1,400,000 yen (around US\$960.26 as of writing) and over criminal cases punishable by fines or lighter punishments.

Japan has no special courts to judge atrocity crimes; Constitution Article 76(2) dictates that no extraordinary tribunal shall be established. Any relevant causes of action discussed below are to be brought in ordinary courts.

**For flow charts of civil and criminal procedure in the Japanese court system see:**  
[https://www.nichibenren.or.jp/en/about/judicial\\_system/judicial\\_system.html](https://www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html)

## International Obligations & Domestic Law

### Relevance Of International Law In The Domestic System

Article 98(2) of the Constitution states that: 'The treaties concluded by Japan and established laws of nations shall be faithfully observed'. Because of this, both international treaties and customary international law are considered as part of domestic law. However, as noted earlier, Article 98(1) indicates that the Constitution is the 'supreme law of the nation'—therefore, if there is a conflict with customary international law or treaty law, the Constitution prevails.

### Process For Concluding & Incorporating Treaties

Article 73, Item 3 of the Constitution states that the Cabinet shall 'conclude treaties' with 'prior or, depending on the circumstances, subsequent approval of the Diet'. Since the 1960s, the Diet has limited the need for formal approval to treaties that: govern circumstances within the Diet's power (eg taxation); require budgetary spending beyond current allocations; or govern the relationship with other States.<sup>8</sup> In practice, this applies to very few treaties and therefore the majority of treaties concluded by Japan are concluded by the Cabinet only.<sup>9</sup>

7. Family courts are co-located with the district courts and have exclusive jurisdiction over cases involving domestic relations and juvenile delinquency.

8. Shin 363.

9. Ibid.

Many treaties are enforced through existing domestic law. For example, when Japan ratified the Rome Statute of the International Criminal Court (Rome Statute) the Japanese government concluded that acts of genocide and crimes against humanity could be punished as traditional crimes, such as multiple homicide, murder, or rape. Therefore, Japan did not create distinct crimes for genocide or crimes against humanity under its national legislation. (For particular war crimes, see below regarding the Law Concerning the Punishment of Grave Breaches of International Humanitarian Law (PGB Act).



Courts tend to treat applicable treaty obligations the same, whether or not the relevant treaty has received formal Diet approval.<sup>10</sup>

### Incorporation Of Obligations Under The Convention Against Torture

Japan acceded to the Convention Against Torture on 29 June 1999. The Convention Against Torture requires States Parties to: (i) take legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction (Article 2); (ii) not expel, refouler or extradite a person to another State where there are substantial grounds for believing that such person would be in danger of being subjected to torture (Article 3); and (iii) investigate and then either extradite or prosecute individuals alleged to have committed conduct that is prohibited in the treaty (Articles 6 and 7).

Article 1(i) of the Convention defines 'torture' through three elements: (i) the conduct of intentionally inflicting 'severe [physical or mental] pain or suffering'; (ii) the severe pain or suffering must be for the purposes of including confession, punishment, intimidation or coercion, or any reason based on discrimination; and (iii) the severe pain or suffering must be inflicted or instigated by or with the consent of a public official.

Following accession, the Government of Japan concluded that no distinct crime of 'torture' needed to be added to the Penal Code to give effect to Japan's Convention obligations. Instead, all acts covered by the Convention are 'covered under various [pre-existing] provisions' in the Penal Code.<sup>11</sup>

If the government concludes that treaty obligations cannot be given effect through existing domestic law upon treaty ratification or accession, Japan will amend or enact domestic law to comply with the treaty.<sup>12</sup> However, this is relatively rare. For example, Japan acceded to the Refugee Convention in 1981. As a result, Japan amended its Immigration Control and Refugee Recognition Act (formerly the Immigration Control Order) and established its refugee recognition system in January 1982 to implement the Convention. It is noted, however, that Japan's accession and amendments to its refugee regime were in response to the ongoing 'mass outflow of Indo-Chinese refugees [from Vietnam, Cambodia, and Laos] in the first half of 1979'.

10. Ibid.

11. Examples of relevant pre-existing crimes are given in the above link. Moreover, predating the Convention, Article 36 of the Japanese Constitution states that '[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden'. Article 13 (protecting the 'right to life, liberty, and the pursuit of happiness') and Article 38 (forbidding the use of confessions made under torture as evidence) are also in line with the spirit of the Convention.

12. Kuniko Ozaki, *An Introduction to International Human Rights Law and International Criminal Law* (2d ed 2021) 80.



## RELEVANT TREATIES TO WHICH JAPAN IS A STATE PARTY

- International Covenant on Civil and Political Rights (ICCPR), ratified 21 June 1979
- International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified 21 June 1979
- Convention Relating to the Status of Refugees (Refugee Convention), acceded 3 October 1981
- Convention on the Elimination of All Forms of Discrimination Against Women, ratified 25 June 1985
- Convention on the Rights of the Child, ratified 22 April 1994
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified 02 August 2004
- International Convention on the Elimination of All Forms of Racial Discrimination, acceded 15 December 1995
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), acceded 29 June 1999
- Rome Statute of the International Criminal Court (Rome Statute), acceded 17 July 2007
- Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention), ratified 23 July 2009

Japan has not yet agreed to be bound by:

- The Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
- The International Convention on the Suppression and Punishment of the Crime of Apartheid; or
- The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).

Notably, the Genocide Convention obliges signatory countries to domestically criminalize (Article V), prosecute (Article VI), and punish (Article IV) the genocide crimes pursuant to the Convention. At present, it does not appear that the Penal Code could cover all crimes or liability prescribed in the Genocide Convention such as incitement or conspiracy.

## Application Of International Law

In the hierarchy of domestic law, treaties are considered below the Constitution but above statutes (at 27). The position of customary international law is less clear because it requires greater justification of its establishment.

Because of the need for clarity and concreteness to apply domestically, some practice suggests that customary international law may be less persuasive than treaties.<sup>13</sup>

13. See for example Tokyo High Court, Judgment of 5 March 1993, Case No 1556 (ne) of 1989, Hanreijihō, No 1466 p 40, 1993, translation in *Japanese Annual of International Law* vol 37, 1994, 129 as cited in Koji Teraya, 'The Domestic Incorporation and Application of Customary International Law and Jus Cogens Norms: Japan's Case' Discussion Paper, Duke-Japan Conference on Comparative Foreign Relations Law, 10 October 2016 at 5.

Japanese courts have demonstrated a preference for locating rights and obligations within domestic law and using international law ‘for the purpose of affirming and supporting [domestic law’s] interpretation’.<sup>14</sup> Notably, courts have been willing, in many cases, to interpret and apply both treaty and customary international law without deference to political actors.<sup>15</sup>

## Treaty Application

Courts have found some treaties to be directly applicable; however, directly applicable treaties such as the ICCPR have clearly delineated individual rights that are also mirrored in domestic law.<sup>16</sup> Contrastingly, courts have declined to directly apply progressively realisable rights such as those under the ICESCR.<sup>17</sup>

Where domestic legislation specifically names treaty provisions (for example in the PGB Act), domestic courts are ‘expected to have recourse to international law straightforwardly’ in interpretation and application—even when no domestic legislation has been created to implement the treaty.<sup>18</sup>

When specifically interpreting Japanese obligations under ratified or acceded treaties, courts have given weight to the Vienna Convention on the Law of Treaties<sup>19</sup> and utilized Human Rights Committee General Comments as a ‘supplementary means of interpretation’.<sup>20</sup>

### Relevant Domestic Practice Using Treaties

‘Given that ratified treaties have domestic force of law in Japan upon the day of promulgation, treaties can be invoked by private parties in litigation in various ways. The most common form of litigation challenging the lawfulness of an act of the administrative authorities is a suit for the annulment of a decision (Torikeshi Soshō). ...When such a suit is duly filed within a specified time limit, the plaintiff can argue the unlawfulness of the decision in question in terms of the relevant domestic law as well as provisions of the treaties.’

From: *Shin Hae Bong, ‘Japan’ in International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Dinah Shelton ed) (Oxford University Press, 2011) 371.*

14. Shin 376.

15. Shin 364 and 373.

16. Cases listed by Shin in which courts have recognized the direct applicability of the rights enshrined in the International Covenant on Civil and Political Rights include: Hanrei Jihō vol 1515, 116; Kōtō Saibansho Keiji Hanrei Sokuhōshū vol of 1999, 136; and Tokyo Kōtō Saibansho, Hanketsu Jihō (Keiji) vol 44, No 1–12, 11, as cited by Shin 368–9.

17. See *Shiomi v Minister of Public Health*, Hanrei Jihō vol 1363, 68 as cited by Shin 370.

18. Shin 362.

19. See for example the judgment of the Tokushima District Court of 15 March 1996, Hanrei Jihō vol 1597, 115, as cited by Shin 364.

20. Judgment of the Ōsaka High Court of 28 October 1994, Hanrei Jihō vol 1513, 71, Hanrei Taimuzu vol 868, 59; Judgment of the Hiroshima High Court of 28 April 1999, Kōtō Saibansho Keiji Saiban Sokuhō–Shū vol of 1999, 136; and Hanrei Jihō vol 1858, 79 as cited by Shin 364.

## Customary International Law Application

Japanese courts have ‘taken judicial notice’ of customary international law particularly when it is raised by a party to a case.<sup>21</sup>

For example, the Tokyo District Court examined ‘customary rules recognized in international law’ (in extract at 629) in relation to the effect of nuclear weapons to determine the legality of their use in the Genbaku (or Shimoda) case.<sup>22</sup> There, survivors of the Hiroshima and Nagasaki bombings sought compensation from the Japanese government because rights to reparation from the United States had been waived by treaty. Although no reparations were granted, the Court relied on evidence of State practice and *opinio juris* to ultimately determine that the bombings were ‘indiscriminate attacks against undefended cities’—and therefore illegal.<sup>23</sup>

Courts have taken a cautious approach to identifying parts of customary international law as *jus cogens* and have ‘never recognized the doctrine of *jus cogens* norms in explicit terms’.<sup>24</sup> However, while denying that the prohibition of confiscation of private property in war constituted *jus cogens*, the Tokyo District Court found that, ‘given that international law is also law, it cannot recognize the legal effect of an agreement between States conflicting with “public order and good morals” that are considered to be an idea or fundamental value ruling all bodies of law established in civilized nations’.<sup>25</sup> Shin goes on to describe the further reasoning stating: ‘consequently, if some states agree, for example, to massacre a certain race of people or to close all the hospitals in a certain area, those agreements are considered null and void as conflicting with ‘public order and good morals’ in international law’.<sup>26</sup>

## Extraterritoriality & Jurisdiction

### Extraterritorial Application Of The Penal Code

Like in many domestic jurisdictions, the Japanese Penal Code provides for domestic criminal jurisdiction for offences committed in the territory of Japan (Article 1(1)) and on board a ship or aircraft registered in Japan (Article 1(2)).

Article 2 provides that the Penal Code applies to certain prescribed crimes committed by either Japanese nationals or non-Japanese nationals *outside of Japan*. These crimes include, amongst others:

- The crimes prescribed under Articles 77 through 79 (Insurrection; Preparations; Plots; Accessoryship to Insurrection) (see Article 2(ii)); and
- The crimes prescribed under Articles 81 (Instigation of Foreign Aggression), 82 (Assistance to the Enemy), 87 (Attempts) and 88 (Preparation; Plots) (see Article 2(iii)).

21. Shin 373.

22. Judgment of 7 December 1963, Kakyū Saibansho Minji Saibanrei-Shū vol 14, No 12, 2435, as cited in Shin 373-375.

23. See also descriptions of the case in Teraya and the Library of Congress.

24. Shin 379.

25. As given in Shin 373 citing Shōmu Geppō vol 12, No 4, 475, Hanrei Jihō vol 441, 3.

26. Shin 373.

Article 3 provides that the Code applies to any Japanese national who commits, outside of Japan, any of the prescribed crimes under Article 3; these crimes include, amongst others, Homicide (Article 3 (vii)) and Forcible Sexual Intercourse (Article 3(v)). Article 3-2 (or Article 3bis) further provides prescribed crimes committed by a non-Japanese national against a Japanese national outside of Japan for which the Penal Code applies.

Article 4-2 (or Article 4bis) is likely of greatest relevance for this brief. Article 4-2 states that:

Beyond what is provided for in the provisions of Article 2 through the preceding Article, this Code also applies to *anyone* who commits those crimes *outside the territory of Japan* prescribed under Part II [all listed crimes] which are governed by a treaty *even if committed outside the territory of Japan* [emphasis added].

**Please note:** Researchers were unable to locate any precedent in which Article 4-2 has been invoked.

## Universal Criminal Jurisdiction

Under Article 4-2 of the Penal Code, Japan permits prosecution under universal jurisdiction for crimes listed in the Penal Code 'which are governed by treaty'. Given that the Government of Japan has preferred not to create new crimes but to locate treaty-prohibited conduct in existing crimes, this appears at first to mean that this provision applies only to crimes that are explicitly listed in the Penal Code. However, this is not the case if read with Government replies to relevant treaty bodies.

For example, replying to the Committee against Torture, in 2011 the Government of Japan appears to state that Article 4-2 applies to crimes that *are defined by a treaty* even if those crimes are explicitly defined in the same fashion in domestic law. This is because, as noted above, Japan has not enacted a distinct crime of 'torture' in the Penal Code; nevertheless the Government states:

[Article 4-2 of] the Penal Code shall apply to anyone who commits those crimes prescribed in the Penal Code that are obliged under a treaty (*which includes the Convention [against Torture]*) to be punished when committed outside Japan [emphasis added].

This is the same in 2018 as in the Government of Japan's reply to the Committee on Enforced Disappearances. Article 9(2) of the Enforced Disappearances Convention requires State Parties 'to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction...'. The Government states that, while no new specific crime was enacted, the Penal Code addresses the crime of enforced disappearance through various existing Penal Code Articles (at [40]). Then, it states:

And it is our understanding that Article 9(2) of the Convention prescribes the obligation on State parties to establish jurisdiction over persons committing enforced disappearance crimes. Therefore the Code is applied to all persons committing the crime of enforced disappearance.. [emphasis added, at [40]].

This suggests that it is the intent of the Government that, under Article 4-2, universal jurisdiction may be exercised for crimes of torture or enforced disappearance (or, as discussed below, grave breaches of the Geneva Conventions) regardless of how the prohibited conduct is (re-)defined in the domestic offences. However, because the Rome Statute does not obligate Parties to domesticate crimes and because Japan is not a Party to the Genocide Convention, it appears that genocide, crimes against humanity, and potentially some non-international armed conflict war crimes would not be prosecutable under Article 4-2. (Nevertheless, this raises the question of whether customary international law could be used to argue separately for the ability to bring such prosecutions.)

Japan has largely not submitted or published public statements in recent UN General Assembly Sixth (Legal) Committee discussions on universal jurisdiction. However, in preparation for a discussion related to the XVIII International Congress of Penal Law in September 2009, Japanese representatives contributed insights to a comparative report on domestic frameworks and approaches to prosecutions under universal jurisdiction.

The following provides a summary related to Japan with paragraph numbers:

- Justification for the exercise of universal jurisdiction is based solely on the existing international obligation to do so [ 9B].
- All relevant domestic courts may exercise universal jurisdiction [43].
- No 'legitimizing link' to Japan is required to trigger universal jurisdiction [17]—yet, it is understood that the State with the strongest connection to the matter should exercise jurisdiction [68].
- Notably, the presence of the accused in Japan is not required to trigger universal jurisdiction [17]; however, as discussed below, the accused must be physically present at trial.
- The accused's physical presence and 'the lack of a more suitable State for the prosecution' constitute 'two conditions' to exercise universal jurisdiction [21].
- Double criminality is not a restriction for prosecution in Japan under domestic law; prosecution may proceed if within time and permitted under Japanese domestic law regardless of the law or period of prescription in the territorial State [171]. However, double criminality is necessary for Japan to permit extradition [122].
- Japan recognizes Head of State immunity for political acts during the individual's period of office [154].

## *Aut Dedere Aut Judicare* Obligations

There is no domestic rule that enshrines the obligation to extradite or prosecute an alleged perpetrator of recognized international crimes [at 127]. The Government of Japan has noted publicly that its understanding of the *aut dedere aut judicare* principle 'is provided for primarily by treaty regimes'.

**Japan is obligated as a State Party to uphold the principle of *aut dedere aut judicare* under international law in the following treaties:**

- The Geneva Conventions and Additional Protocol I
- Single Convention on Narcotic Drugs and its Amending Protocol
- Convention for the Suppression of Unlawful Seizure of Aircraft
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- Convention on the Psychotropic Substances
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
- International Convention against the Taking of Hostages
- Convention on the Physical Protection of Nuclear Material
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
- Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- Convention on the Safety of the United Nations and Associated Personnel
- International Convention for the Suppression of Terrorist Bombings
- International Convention for the Suppression of the Financing of Terrorism
- Convention against Transnational Organized Crime, its Trafficking Protocol, and its Smuggling Protocol
- United Nations Convention against Corruption
- Convention for the Suppression of Acts of Nuclear Terrorism
- Convention for the Protection of All Persons from Enforced Disappearance

## Extradition

### Applicable International and Domestic Law

Generally speaking, Japan will recognize a legal obligation to extradite a fugitive as requested by a foreign State when there is an extradition treaty between the requesting State and Japan. However, extradition will be subject to applicable restrictions under the treaty and domestic laws.

At publication, Japan has entered into bilateral extradition treaties with only the US and the Republic of Korea. As noted above, Japan also has obligations under multilateral treaties with provisions on extradition, such as the Convention against Transnational Organized Crime<sup>27</sup> and the Convention against Corruption. Although treaty obligations for extradition are limited, Japan is able to accede to an extradition request even where there is no specific extradition treaty. This is the case if a request for extradition complies with the requirements given in the relevant domestic legislation, the Act of Extradition (Extradition Act).

All extradition procedures are carried out in accordance with the Extradition Act, unless there is an applicable extradition treaty between Japan and the requesting State—then such treaty is also applied.

### Japan & Mutual Legal Assistance

In contrast to its limited extradition treaties, Japan has entered into bilateral treaties in relation to legal assistance in criminal matters with the US, the Republic of Korea, the People's Republic of China, the Hong Kong Special Administrative Region, the European Union, the Russian Federation and the Socialist Republic of Viet Nam.

Also under the Convention against Transnational Organized Crime, Article 18 (Mutual Legal Assistance) obligates Parties to provide each other with the widest measure of 'mutual legal assistance in investigation, prosecutions and judicial proceedings'. This means that Japan can request mutual legal assistance (MLA) from and provide MLA to countries with whom Japan does not otherwise have a specific treaty. However, this process is more complicated, and has a higher chance of rejection, compared to the process for MLA for jurisdictions with which Japan has a treaty.

Notably, a failure to guarantee reciprocity by a requesting State or a failure to meet a 'dual criminality' requirement (discussed below), amongst other scenarios, would warrant a 'mandatory refusal' of an MLA request in relation to obtaining an evidence.

Guidance on the required process for, and content of, MLA requests can be found on the Ministry of Justice website.

27. Pursuant to Article 3 (Scope of Application) of the Convention against Transnational Organized Crime, the Convention applies with respect to:

- (i) Any conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty; and
- (ii) Offences which constitute criminalization of participation in an organized criminal group, criminalization of the laundering of proceeds of crime, criminalization of corruption, or criminalization of obstruction of justice.

## Process for Extradition

Any extradition request must be made through a diplomatic channel. The Minister of Foreign Affairs checks if the formality of the request is: (1) consistent with the requirements of the extradition treaty if applicable, or (2) if the request honors reciprocity, if no treaty applies. The Minister of Foreign Affairs then forwards the request and the relevant materials to the Minister of Justice.

The Minister of Justice then must forward the request and relevant materials to the Superintending Prosecutor of Tokyo High Public Prosecutors Office, unless under Article 4(1)(i)-Article 4(1)(iv) of the Extradition Act the Minister deems it 'inappropriate to extradite'. This determination of inappropriateness may include circumstances where there are substantial grounds for believing that the fugitive would be in danger of being subjected to torture in the State requesting the extradition (at 14).

If forwarded from the Minister of Justice, a public prosecutor of the Tokyo High Public Prosecutors Office then applies to the Tokyo High Court to determine whether a case is extraditable. Notably, Article 2 of the Extradition Act provides that an extradition request must be denied in any of the following circumstances; except where an extradition treaty provides otherwise with respect to cases falling under limbs (iii), (iv), (viii) or (ix) below, in which case such treaty shall apply:

- (i) When the underlying offence is a political offence;
- (ii) When the extradition request is deemed to have been made with a view to trying or punishing the fugitive for a political offence;
- (iii) When the underlying offence is not punishable by death, life imprisonment or for a term of three years or more according to the laws and regulations of the requesting State;
- (iv) When the underlying offence is deemed to have been committed in Japan and would not be punishable under the laws of Japan by death, life imprisonment or for a term of three years or more;
- (v) When it is deemed that the underlying offence was committed in Japan or the trial for the offence was held in a Japanese court, but the imposition or the execution of punishment for the requested offence would be barred under the laws and regulations of Japan;
- (vi) Except where a fugitive has been convicted in the requesting State for the underlying offence, when there is no probable cause to suspect that the fugitive committed the act constituting the requested offence;
- (vii) When a criminal case based on the act constituting the requested offence is pending in a Japanese court, or when the judgment in the case has become final and binding;
- (viii) When a criminal case for an offence committed by the fugitive other than the requested offence is pending in a Japanese court, or when the fugitive has been sentenced to punishment in a Japanese court, but has not completed serving the sentence or the sentence is still enforceable; or
- (ix) When the fugitive is a Japanese national.

If the Tokyo High Court decides that the case is extraditable *and* the Minister of Justice finds the surrender appropriate, then the Minister of Justice orders the prosecutor of the Tokyo High Public Prosecutors Office to surrender the fugitive.



Note that an individual does not have the right to appeal an extradition decision; cancellation may be sought on administrative law grounds in relation to the Minister of Justice's decision.

## Legal Requirements For Making A Request

To support a request for extradition, a request must include:

- (i) Information necessary for identifying the individual(s), including their name, age, sex, nationality, occupation and address;
- (ii) Information necessary to identify the individual's crimes, including the text of the relevant articles of the requesting State's laws and details of the conduct that constitutes the requested offence,
- (iii) Sufficient information explaining that the conduct constitutes an offence and it is punishable (eg there are no circumstances which bar the prosecution such as the expiration of a statute of limitations) under the requesting State's laws, and
- (iv) The stage of the criminal procedure against the individual in the requesting State.

Japan requires that the relevant conduct meet a 'dual criminality requirement'. In other words, the conduct must be punishable as a severe offence under the laws of both the requesting State and under the laws of Japan. When the fugitive has not been convicted in the requesting State, the requesting State must show 'probable cause' to conclude that the fugitive committed the underlying offence.

### **Japan retains the death penalty for the most serious offences.**

If you are advocating for extradition to Japan or mutual legal assistance for Japanese matters, it is important to note that, States *without* the death penalty often mandate refusal of assistance if the Requesting State cannot assure that the death penalty will not be carried out.

## Sanctions

The Foreign Exchange and Foreign Trade Act (FEFTA) is the key legislation on sanctions and regulates:<sup>28</sup>

- Cross-border goods transactions (import and export of goods);
- Service transactions (such as the transfer of technology and software between countries);
- Payments from Japan to a foreign State and between Japanese residents and non-residents; and
- Capital transactions (such as money deposits, money lending, and trading of securities).

28. Articles 16(1), 21(1), 24(1), 25(4), 48(3), and 52.

Under Article 5 (Scope of Application), the FEFTA applies to anyone whose conduct falls under the FEFTA regulations, including:

- Japanese residents;
- Legal persons having their principal offices in Japan; and
- Branch offices, local offices or other representatives or offices in Japan of non-resident entities (emphasis added, see also Article 6(v)).

Implementation and enforcement of the FEFTA falls generally to the Ministry of Finance or the Ministry of Economy, Trade, and Industry. Under the FEFTA, these authorities have the power to impose sanctions in the following cases:<sup>29</sup>

- The competent authority deems it necessary to fulfill Japan's international obligations under treaties and other international agreements;
- The competent authority finds it necessary as part of Japan's contribution to international efforts to achieve international peace; or
- The Cabinet decides to take countermeasures necessary to maintain peace and security in Japan under Article 10(1).

The majority of Japan's economic sanctions (link in Japanese only) are implementing UN Security Council (UNSC) resolutions. Japan also implements sanctions measures based on international cooperation with other countries or blocs, such as the United States and the European Union, as well as unilateral sanctions that are not derived from UNSC resolutions or international cooperation.

The FEFTA provides both corporate and personal criminal liability for any violation of the sanction measures.

Offenders may be subject to imprisonment for not more than three years<sup>30</sup> (or not more than five years for certain transactions that are subject to economic sanctions<sup>31</sup>) or a fine of not more than one million yen<sup>32</sup> (or not more than 10 million yen for certain transactions that are subject to economic sanctions, provided, however, if five times the value of the subject matter of the violation exceeds 10 million yen, the fine to which the person is subject is not more than five times that value).<sup>33</sup> The Ministry of Finance Japan (MOF) maintains a list of sanctioned individuals and entities (Sanction List), and this list can be accessed at the MOF's website.<sup>34</sup>

Taking recent sanctions against Russia as an example, Japan has introduced the following measures<sup>35</sup> under the FEFTA, based on the Cabinet Understanding of 'Asset Freeze for individuals and entities of the Russian Federation and other measures as of January 27, 2023':

(a) Asset Freeze measures, which include: (i) restrictions on payments and (ii) restrictions on capital transactions. A permission system is applied to payments and capital transactions (ie contracts of deposit, trust, and money loans) with the individuals and entities designated by the Ministry of Foreign Affairs Notice.

29. Article 16(1); Article 21(1); Article 24(1); Article 25(4); Article 48(3); and Article 52.

30. Article 16(1); Article 21(1); Article 24(1); and Article 25(6).

31. Article 48(3) and Article 52.

32. Article 16 (1); Article 21(1); Article 24(1); and Article 25(6).

33. Article 48(3) and Article 52.

34. Although the link provided is in Japanese, a list of individuals subject to asset freezing is provided in Excel at the bottom of the webpage. The Excel document is in both Japanese and English.

35. Ministry of Foreign Affairs of Japan, Measures based on the Foreign Exchange and Foreign Trade Act regarding the situation surrounding Ukraine (27 January 2023). See also, Measures based on the Foreign Exchange and Foreign Trade Act regarding the situation surrounding Ukraine (26 May 2023).

- (b) Prohibition on exports to specific entities of the Russian Federation.
- (c) Prohibition on exports to Russia of dual-use items which could contribute to the development of military capacity and others.

Of relevance to crimes committed in Asia and despite repeated public calls, Japan has avoided imposing sanctions on Myanmar or withdrawing from key infrastructure investments in Myanmar (though, see the State Liability Act below).

## Selected Legislation In Depth

### Act No 45 of April 24, 1907

#### The Penal Code

##### AREA OF LAW

Criminal Law

##### CONDUCT ADDRESSED

The Penal Code is Japan's primary legislation under which atrocity crimes may be prosecuted (see also the PGB Act below). The below considers the Penal Code as read with the Rome Statute.

When Japan acceded to the Rome Statute in 2007, Japan enacted the Act on Cooperation with the International Criminal Court which sets out the framework and procedures for cooperation between Japan and the Court including, amongst other measures, investigations, evidence sharing, trials, and execution of given sentences. However, Japanese legislators took a position (link in Japanese only) that no new legislation was required to punish the serious crimes described under the Rome Statute. This means that the government concluded that almost all crimes under the Rome Statute (ie crimes under the ICC's jurisdiction) could be covered by 'ordinary' domestic crimes such as homicide, injury, assault, arson, forcible sexual intercourse, robbery, unlawful capture, confinement and human trafficking. It was concluded that, in the event that conduct was not criminalized and therefore not able to be prosecuted in Japan, the principle of complementarity would permit the ICC to instead prosecute—with which Japan would cooperate.

Consider the following potential limitations:

- The crime of genocide through imposing measures intended to prevent births within the group (Rome Statute Article 6(d)), if it is committed without threatening, assaulting or deceiving (see limitations regarding, eg, Penal Code Article 177 (Forcible Sexual Intercourse); Article 204 (Injury); Article 215 (Abortion Without Consent); or Article 216 (Abortion Without Consent Causing Injury or Death)).

## CONDUCT ADDRESSED (Cont)

- Intentionally directing attacks against civilian objects (Rome Statute Article 8(2)(b)(ii)), if it results in just an attempt (see limitations of, eg, Penal Code Article 112 (Attempts) read with Article 108 (Arson of Inhabited Buildings)).
- Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment (Rome Statute Article 8(2)(b)(iv)) if it is committed in a certain manner but the damage does not eventuate (see, eg Penal Code Chapter XV (Crimes Related To Drinking Water) which does not criminalize attempts).
- Utilizing the presence of civilian or other protected person to render certain points, areas or military forces immune from military operation (Rome Statute Article 8(2)(b)(xxiii)), if the civilian or other protected person consents to be there of their own will.

Likewise, the Penal Code does not appear to cover particular Rome Statute modes of liability:

### ***Individual Criminal Responsibility For Incitement Of Genocide***

Rome Statute Article 25(3)(e) sets out individual criminal responsibility related to direct and public incitement of genocide (conduct for which there is no distinct domestic crime). Under the Penal Code, 'incitement' would likely fall under Chapter XI (Complicity), Article 61 (Inducement). Under Article 61, the 'inducing' person is only individually criminally responsible if the 'induced' person ultimately commits the crime.

### ***Command and Superior Responsibility***

Regarding Rome Statute Article 28, the Government of Japan took the position that the Penal Code can punish commanders or superiors (hereafter 'superiors') as accomplices (see Article 62). The Government did not see the need to establish separate liability because of the principle of modesty of the Penal Code (link in Japanese only)—in other words, because a punishment is a sanction which deprives the life, liberty, and property of a human being, it should be used when only when it is 'unavoidable', not in cases where a superior may be unaware of subordinates' crimes.

## CONDUCT ADDRESSED (cont)

However, where a superior does not recognize a subordinate's crime but nevertheless had a responsibility to be aware (punishable under the Rome Statute), the Penal Code does not necessarily regard it as punishable. Likewise, while the Rome Statute requires superiors to take reasonable measures to address subordinates' conduct, there is no corresponding obligation under the Penal Code.

## COURTS WITH JURISDICTION

Ordinary courts of first instance.

Investigations are initiated by the police and public prosecutors and can be triggered by 'reports and notifications from victims or witnesses of crimes, police interviews and questioning, complaints, and accusations, depending on the type and nature of the case' (at 12).

For an outline of 'proceedings from investigation to judgment in first instance' published by the Supreme Court, please see [here](#).

## EXTRATERRITORIAL APPLICATION

As noted above, the Japanese Penal Code is based on the territorial principle (Article 1(1)) and allows extraterritorial application restrictively. Extraterritorial jurisdiction applies to serious crimes enumerated in Articles 2-4, including crimes such as:

- Insurrection, instigation of foreign aggression committed by any person (Article 2(ii) and (iii));
- Homicide, injury, arson, forcible sexual intercourse, robbery, unlawful capture, confinement or human trafficking committed *by any Japanese national* (emphasis added, Article 3(i), (v), (vii), (viii), (xi), (xii) and (xiv));
- Homicide, injury, forcible sexual intercourse, robbery, unlawful capture, confinement or human trafficking committed *against a Japanese national* by any non-Japanese national (emphasis added, Article 3-2(i), (ii), (iii), (iv), (v) and (vi)); and
- Assault and cruelty or bribery by specific public officials of Japan (Article 4(iii)).

In addition, Article 4-2 of the Japanese Penal Code adheres to the universality principle for crimes prescribed under Part II of the Penal Code which Japan is obligated to punish under treaties even if they are committed outside Japan (eg Convention against Torture).

## EXTRATERRITORIAL APPLICATION (cont)

Article 4-2 came into effect in 1987. Therefore, the Japanese Penal Code was applicable only to crimes recognised in international treaties to which Japan became a Party after Article 4-2's enactment.

Upon the enactment of the PGB Act in 2004, the Geneva Conventions of 1949 is subject to Article 4-2. By the enactment of the PGB Act, the grave breaches of the Geneva Conventions of 1949 became punishable under the Penal Code and the PGB Act even when committed outside of Japan.

Note, however, that extraterritorial atrocity crimes must fall under Article 4-2 in order for Japanese courts to have jurisdiction.

## PRESENCE OF THE ACCUSED

Participation in the criminal proceedings is both a right and duty of the accused, recognized in the Constitution and the Code of Criminal Procedure. Article 286 of the Code of Criminal Procedure states that criminal proceedings must not proceed without the presence of the accused unless: (1) the accused is a corporation and instead a representative appears at trial (Article 283); (2) the crime of which the accused is charged is punishable by a limited fine (Article 284); or (3) judgment is not being pronounced and 'the court deems that the attendance of the accused is not important for defence of the rights of the accused' (Article 285).

Additionally, presence may be excused where:

- Under Article 286-2, the accused, under detention, refuses to appear without a justifiable reason and it is extremely difficult for the authorities to bring the accused to the court; or
- Under Article 341, the accused does not make any statement and leaves the court without permission or the court orders the accused to leave for the sake of maintaining order.

## PRESCRIPTION/ STATUTE OF LIMITATIONS

Japan has not ratified the Convention on the Non-Applicability of the Statutory Limitation to War Crimes and Crimes against Humanity. Therefore the statute of limitations for 'ordinary crimes' applies to crimes that might otherwise be classified as 'atrocities crimes'.

The statute of limitations under Article 250 of the Code of Criminal Procedure (as amended in 2010) is as follows (which is still applicable to crimes that are not prescribed as of 27 April 2010):

### **For crimes involving the victims' death and that have a maximum penalty of imprisonment:**

- No statute limitation for crimes punishable with the death penalty (eg homicide or robbery causing death);
- 30 years for crimes punishable with imprisonment for life (eg forcible sexual intercourse causing death);
- 20 years for crimes punishable with 20 years' imprisonment (eg injury causing death); and
- 10 years for other crimes (eg negligence in the conduct of business causing death).

### **For crimes other than above:**

- 25 years for crimes punishable with death penalty (eg arson of inhabited buildings);
- 15 years for crimes punishable with life imprisonment (eg robbery causing injury or forcible sexual intercourse causing injury);
- 10 years for crimes punishable with imprisonment for 15 years or more (eg injury or robbery);
- 7 years for crimes punishable with imprisonment for less than 15 years;
- 5 years for crimes punishable with imprisonment for less than 10 years (eg assault and cruelty by specific public officials not causing death);
- 3 years for crimes punishable with imprisonment for less than 5 years or a fine (eg human trafficking); and
- 1 year for crimes punishable with penal detention or a petty fine.

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**At time of writing,  
no leading cases on atrocity crimes prosecuted  
under the Penal Code could be identified.**

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# Act No 115 Of 2004

## Act On Penal Sanctions Against

### Grave Breaches Of The International

#### Humanitarian Law (PGB Act)

#### AREA OF LAW

Criminal

#### CONDUCT ADDRESSED

The PGB Act, a part of Japanese legislation concerning emergency situations, criminalized ‘grave breaches’ as recognized in the four Geneva Conventions of 1949 and its Additional Protocol I of 1977. The PGB Act ‘was the first piece of legislation adopted in Japan since the end of World War II that specifically addressed the punishment of international crimes, in this case war crimes’.<sup>36</sup>

Importantly, ‘grave breaches’ of the Geneva Conventions traditionally refers to violations of the Geneva Conventions that occur only in international armed conflict (meaning conflict between States)—as opposed to ‘war crimes’ which occur in international and non-international armed conflict (meaning conflict other than between States, including civil war).

Article 1 (Purpose) of the PGB Act confirms that in Japanese law, the criminalized acts apply to only conduct that occurs in ‘international armed conflict’. (However, see below regarding the decreasing importance of the ‘grave breaches’ versus ‘war crimes’ and international versus non-international armed conflict distinctions.)

The PGB Act prescribes the following ‘grave breaches’ that were not otherwise recognized in the Penal Code. These include:

- The crime of destruction of important cultural properties (Article 3);
- The crime of delaying the repatriation of prisoners of war (Article 4);
- The crime of transfer of its own civilian population into occupied territories (Article 5); and
- The crime of obstructing the departure of civilians (Article 6).

36. Meierhenrich and Ko 241. See also Kyo Arai, Akira Mayama, and Osamu Yoshida ‘Accession of Japan to the International Criminal Court: Japan’s Accession to the ICC Statute and the ICC Cooperation Law’ Japanese Yearbook of International Law, 51 (2008), 359–383, 373.



## COURTS WITH JURISDICTION

Ordinary courts of first instance.

## EXTRATERRITORIAL APPLICATION

Article 7 of the PGB Act provides that Article 4-2 of the Penal Code (the universality principle) applies to these crimes. Therefore, crimes under the PGB Act are prosecutable and punishable even when committed outside of Japan.

## NATIONALITY REQUIREMENTS

No nationality requirements exist in relation to the crimes under the PGB Act.

## ADDITIONAL NOTES

At time of writing, the research team was unable to locate any cases in which the crimes under the PGB Act were prosecuted.

Note that a particular emphasis on ‘grave breaches’—and not broader international and non-international war crimes—may seem limiting. However, there is growing evidence to suggest that, as international criminal law has progressed, the distinction between ‘grave breaches’ and ‘war crimes’ is blurring particularly with reference to the continued development of customary international law.

See, for example:

- Nicaragua at [218];
- Tadić at [127];
- Ferdinandusse at 737 citing District Court of Stockholm, Arklöf, 18 December 2006, as reported in *Oxford Reports on International Law in Domestic Courts* (ILDC) (SE 2006) 633;
- Ferdinandusse at 738 citing Court of Assizes of Brussels, Nzabonimana and Ndashyikirwa, 29 June 2005, as reported in 8 *Yearbook of International Humanitarian Law* (2005) 398-399; and
- Klamberg.

# Law No 125 Of 1947

## Concerning State Liability For Compensation (State Liability Act)

### AREA OF LAW

Civil

### CONDUCT ADDRESSED

The State Liability Act addresses the civil liability to compensate losses caused by government bodies or government officials.

Article 1 of the State Liability Act states:

When a governmental official who is in a position to wield governmental powers of the State or of a public body has, in the course of performing his duties, illegally inflicted losses upon another person either intentionally or negligently, the State or the public body concerned shall be liable to compensate such losses.

The Act was enacted to give effect to Constitution Article 17, which states:

Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.

### COURTS WITH JURISDICTION

According to the Japanese Code of Civil Procedure, the 'general venue for an action against the State is determined by the location of the government agency that represents the State in the litigation' (Article 4(6)).

### NATIONALITY REQUIREMENTS

As noted above, the State Liability Act was enacted to give effect to Constitutional Article 17, which states that '[e]very person may sue' (emphasis added). This means that an affected person of any nationality may have the right to bring a case. Since the 1990s, this has included cases brought by non-Japanese nationals, but with limited success for other reasons.

### PRESCRIPTION/ STATUTE OF LIMITATIONS

Regarding torts, Article 724 of the Civil Code states that:

In the following cases, the claim for compensation for loss or damage caused by tort is extinguished by prescription:

- (i) the right is not exercised within three years from the time when the victim or legal representative thereof comes to know the damage and the identity of the perpetrator; or
- (ii) the right is not exercised within 20 years from the time of the tortious act.

## ADDITIONAL NOTES

# State Liability Act

Of relevance for this brief, the State Liability Act has largely been used for claims against the Japanese State, brought by victims of World War II abuses including forced labour, ill-treatment of prisoners of war, and sexual violence. Although judgments are difficult to find in English, see this translation of the decision of the Yamaguchi District Court partially in favour of the plaintiffs in the first case by Korean victims of the so-called 'comfort women' system.

However, the period of prescription and the non-retroactivity of the State Liability Act (having been enacted post-World War II), has meant many of these claims have not been successful. A third hurdle to these claims—the State's claim of sovereign immunity prior to the law's enactment—was not upheld in a 2003 decision in the Tokyo High Court (see here on page 6) and a 2004 decision in the Fukuoka High Court (see here on page 7). Nevertheless, subsequent practice in relation to World War II claims has not consistently rejected sovereign immunity.

These three hurdles (the period of prescription, non-retroactivity of the Act, and arguments of state immunity) may not be relevant to present-day tort claims under the Civil Code. This could leave open the possibility of bringing cases under the State Liability Act for harm resulting from Japanese state decisions (including procurement or investment in conflict-related corporations). However, all evidence and pleadings must be submitted in Japanese, making it challenging for non-nationals to mount such a case.

In reference to using the Act to assert a plaintiff's rights, Shin states that a 'plaintiff can make arguments grounded on the unlawfulness of the act in question in view of applicable domestic law and treaties'.<sup>37</sup>

37. Shin 371.

# Relevant Practice and Case Summaries

## Criminal Law

### *Prosecuting Piracy*

Read together, Articles 2, 3, and 4 of Japan's 2009 Law on Punishment of and Measures against Acts of Piracy permit the criminal prosecution and punishment for piracy outside of Japanese territorial waters committed by non-Japanese nationals against non-Japanese-registered ships. In 2013, the Tokyo District Court found four Somali men guilty of piracy in what has been described as an exercise of universal jurisdiction. The men were found guilty of attacking the Bahamian-registered vessel off the coast of Oman in March 2011. The ship, the MV Guanabara, was operated at the time by Mitsui OSK Lines, a Japanese company. The men had been seized by the US Navy and transferred to Japan for trial.

The convictions and sentences were appealed to the Tokyo High Court, in part on the basis that the United Nations Convention on the Law of the Sea (UNCLOS) Article 105 only provided 'adjudicative jurisdiction' to a 'seizing [S]tate' (here, the US and not Japan). The Court found in relation to this argument that, in fact, customary international law permitted every State to exercise its adjudicative jurisdiction in relation to piracy. The Tokyo High Court ultimately dismissed all claims for appeal.

## Civil Law

### *Discrimination Versus Persecution; Statelessness Of The Rohingya*

Japan acceded to the Refugee Convention in 1981 and set out its official procedures for applying for recognition of refugee status in the Immigration Control and Refugee Recognition Act. People determined to be refugees are given the same benefits under the Japanese social security system as provided to Japanese citizens and other foreign nationals.

Japan interprets the definition of 'refugee' strictly and the Japanese authorities have held the view that an applicant would not be a refugee unless such person is personally recognized and persecuted by a government. Likewise, the understanding of 'persecution' is limited to is an attack or oppression which causes ordinarily unacceptable and intolerable suffering to a person, in general, and which is appropriate to recognize as representing a violation or suppression of freedom to life or physical integrity of the persecuted (at 79-80).

In two court judgments concerning the revocation and declaration of nullity of denials of refugee status in 2010<sup>38</sup> and 2013,<sup>39</sup> the courts acknowledged that a majority of Rohingya are not given nationality in Myanmar, that they face limitations in their social lives, and that they suffer discrimination. However, the courts held that discrimination against the Rohingya in and of itself does not amount to persecution—refugee status was ultimately only granted to two of the twenty Rohingya plaintiffs involved in the 2010 case.

Therefore, it is possible under Japanese domestic law to be stateless but not meet the criteria to be deemed a ‘refugee’ (at 78). Notably, Japan is neither a State Party to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness.

## Using Tort Law

Tort law may provide an interesting avenue by which to utilise treaty and customary international law within the Japanese domestic system.

Japanese tort law shares similarities with other civil law systems, particularly the French system.<sup>40</sup>

Article 709 of the Civil Code states:

A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence.

Article 710 extends this to the State:

A person liable for compensation for loss or damage pursuant to the provisions of the preceding Article must also compensate for loss or damage other than of property, regardless of whether that person infringed the body, liberty or reputation of another person, or infringed property rights of another person.

Like most tort law, there are four elements to make out:

- (i) The act at issue was ‘unlawful’;
- (ii) Damage or loss has been incurred;
- (iii) There is a causal link between the act and the damage or loss; and
- (iv) Evidence of the tortfeasor’s fault (intent or negligence) engaging in the act.<sup>41</sup>

38. Tokyo District Court, Judgment of 29 October 2010 (Heisei 19 Nen (Gyou-u) No. 472, etc.), as cited in Osamu Arakaki Statelessness Conventions and Japanese Laws: Convergence and Divergence (trans Hajime Akiyama) United Nations High Commissioner for Refugees (March 2015) 43.

39. Tokyo District Court, Judgment, 19 November 2013 (Heisei 25 Nen), as cited in Arakaki 43.

40. Oda 180.

41. Adapted from Oda 181.

On the requirement of 'unlawfulness', Oda writes:

The [Civil] Code provides that tort is a violation of the rights of a person. The prevailing view among academics is that, in interpreting this provision, one should not be concerned about the extent to which the right in question is recognised. Instead, they assert, the 'unlawfulness' of the act is decisive. This 'unlawfulness' is not explicitly provided by the law. It is not equivalent to illegality or breach of law, although they may overlap. The unlawfulness of the act is decided by balancing the nature of the interest which was violated and the mode of the tort. For example, where pollution or public nuisance exceeds the limit tolerable by the victims, it is regarded as 'unlawful'. If the infringed interest is significant, even a slight contravention of law or breach of duty may result in liability; if the interest is not so significant, a major violation of law is required to establish liability. In essence, the remedy is not to be limited to cases where a right in the strict legal sense has been infringed. [Citations omitted]<sup>42</sup>

The requirement of 'unlawfulness' has been interpreted in relation to treaty obligations. For example, although Japan had not taken steps to domestically incorporate its obligations following accession to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Shizuoka District Court used the treaty to determine whether the plaintiff's 'rights or legally protected interests' were infringed under Article 709. In the matter which concerned a Brazilian national being excluded from a shop, the Court stated:

[T]he International Convention on the Elimination of All Forms of Racial Discrimination...requires State parties to take legislative or other measures against discriminatory acts by individuals and groups.... If we premise the view of the Ministry of Foreign Affairs that this Convention does not require any legislative measures, it is understood that substantive provisions of the Convention operate as an interpretative element of tort, in a case, such as the present one, concerning a claim for compensation based on an unlawful act against an individual.<sup>43</sup>

Moreover, Article 709 is 'intentionally abstract in order to give sufficient discretion to the courts in their interpretation'.<sup>44</sup> This has allowed tort law to be used to assert the rights of victim groups regarding pollution, indicating the ability to use tort provisions to address widespread harm.<sup>45</sup> (On practice related to environmental law, see [here](#).)

For the purposes of bringing cases in Japan, as discussed above, there must be a nexus between the defendant and Japan (eg a corporation domiciled in Japan or a claim against the State regarding regulation of such a corporation).

42. Oda 185.

43. Shizuoka District Court, Judgment of 12 October 1999, Hanrei Jihō vol 1718, 92, Hanrei Taimuzu vol 1045, 216 as reported by Shin 377.

44. Oda 181.

45. Ibid. See also Eri Osaka [Reevaluating the Role of the Tort Liability System in Japan](#) *Arizona Journal of International and Comparative Law* (2009) 393-426; and Jonas Knetsch 'Mass Accidents: A Challenge for Tort Law Comparative Analysis of Alternative Compensation Schemes in Japanese and French Law' *Journal of Japanese Law* (2016) 205-220.

# Appendix

## Additional Related Case Summaries

As Cited in Shin Hae Bong, 'Japan' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Dinah Shelton ed) (Oxford University Press 2011) 373–375.

CITATION	TYPE	RELEVANCE	SUMMARY
Saikō Saibansho Minji Hanrei-Shū vol 60, No 6, 2542.	Civil	Customary International Law & Sovereign Immunity	In the Supreme Court Japanese plaintiffs were permitted to sue the Pakistani government over a contract dispute. The Court found that customary international law no longer recognises sovereign immunity for commercial acts. An exception to this may be where exercising civil jurisdiction could infringe sovereignty.
<p><b>Tokyo District Court:</b> Judgment of 25 January 1969, Gyōsei Jiken Saibanrei-Shū vol 20, No 1, 25.</p> <p><b>Overtaken by Tokyo High Court:</b> Judgment of 19 April 1972, Hanrei Jihō vol 664, 3.</p> <p><b>Appeal rejected by Supreme Court:</b> Judgment of 26 January 1976, Hanrei Taimuzu vol 334, 105.</p>	Civil	Customary International Law & Extradition for Political Offenders	A Republic of Korea national who had been smuggled into Japan and been active in political demonstrations against his government received an expulsion order. Seeking annulment of the order, the applicant argued that customary international law prevented his extradition to a country where he would face the risk of persecution—an argument related to the protection of political opinion and non-refoulement. The Tokyo District Court accepted this, <u>suggesting also that customary international law was superior to statute</u> (at 6). However, the Tokyo High Court differentiated extradition for political offences and expulsion for illegal entry/residence. The Supreme Court rejected an appeal from the High Court.
Tokyo High Court, Judgment of 3 February 1993 Tokyo Kōtō Saibansho, Hanketsu Jihō (Keiji) vol 44, No 1–12, 11.	Civil	Conflict between Treaty & Statute where Treaty Prevails	The Tokyo High Court found that Article 14(3) (f) of the ICCPR (permitting the non-national defendant the use of a free interpreter) was directly applicable to domestic law and that a payment fee for interpretation under the Japanese Code of Civil Procedure was not applicable.
Tokushima District Court, Judgment of 15 March 1996, Hanrei Jihō vol 1597, 115.	Civil	Use of Vienna Convention on the Law of Treaties (VCLT) to Interpret Treaty Obligations; Use of Comparative Treaties to Interpret Obligations; Conflict between Treaty & Statute where Treaty Prevails	A prisoner prevented from seeing his legal counsel brought a claim for state compensation. The Tokushima District Court interpreted ICCPR Article 14(1) (right to a fair and public hearing) using VCLT Articles 31–32 and the European Court of Human Rights' interpretation of corresponding European Convention on Human Rights Article 6(1) to find provisions of the domestic Prison Law and its implementing Regulations void.

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## *Project Background*

Recognising the opportunities to address atrocity crimes in Asia, the AJC secretariat has commissioned and edited several reports on legal avenues to justice and accountability in the region. These include briefs on available legislation and causes of action for survivors of atrocity crimes in 9 Asian jurisdictions; a two-part report on making sanctions a stronger tool for accountability; and primers related to strategies to address refoulement.

This series, 'Jurisdictional Briefs for International Justice in Asia', considers existing legal "hooks" that practitioners might consider if supporting survivors of international crimes.

It builds on the AJC secretariat's scoping work on universal jurisdiction and its convening series, bringing together a diverse group of experts to examine civil society's role in pursuing universal jurisdiction cases, universal jurisdiction and the so-called Global South, and opportunities for universal jurisdiction cases in Asia.

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Although broader, these reports are inspired by and modelled on the Syria Justice and Accountability Centre's resource 'A Summary of Legal Avenues for Victims of Crimes in Syria under US Law.'

## *About The Asia Justice Coalition*

Founded in 2018, the Asia Justice Coalition's purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The Coalition operates through collaboration, resource-sharing, and coordinating efforts between local and international civil society organizations working in the region. Its work is accomplished by undertaking joint activities relating to justice and accountability and engaging in collective advocacy.

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[www.asiajusticecoalition.org](http://www.asiajusticecoalition.org)