JAPAN

SURVEY QUESTIONS & RESPONSES[1]

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities.*

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

1. Listed Companies

(1) Companies whose issued securities are listed on stock exchanges or whose issued securities are over-the-counter stocks ("listed companies" hereinafter) must submit to the Prime Minister an Extraordinary Report disclosing information concerning material events of public interest and/or material events related to the protection of investors, if any such events occur. Securities and Exchange Act (SEA), Art. 24-5, Para. 4, Cabinet Office Ordinance Concerning Disclosures of Business Entities (CODBE), Art. 19. Such "material events" include events involving litigation and other risks such as those risks described below (CODBE, Art. 19, Para. 2, No. 6

[1] The initial responses to this survey of Japanese law were provided by the Japanese non-governmental organization *Human Rights Now*, coordinated by Professor Yasunobu Sato, Graduate Program on Human Security, Tokyo University. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Japan (Human Rights Now), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006".

and 12). Note that a listed company must submit an Extraordinary Report regarding the same kind of events that occurred in relation to its consolidated company (Id. No. 14 and 19).

a) Where a company is sued for damages where the amount claimed exceeds 15% of the net assets of the company or the amount actually awarded exceeds 3% of the net assets.
b) Where there is an event that critically affects fiscal conditions and management performance of the company (where there is an event causing a loss that exceeds 3% of the net assets of the company and 20% of its average net profit of the recent five years).

In making a public offering or public selling of securities, in principle, the intended action must first be registered with the Prime Minister. (SEA, Art. 4). A Registration Statement must be submitted that includes (i) matters pertaining to the public offering or public selling, and (ii) the name of the company, the business group to which the company belongs, business conditions of the company, financial conditions of the company, and other important matters, etc. (SEA, Art. 5, CODBE, Art. 8, etc). As a matter of course, "business conditions" include such risk-related information as described above in connection with an Extraordinary Report. Also, "financial conditions" include financial statements such as a balance sheet, a statement of profit and loss, a cash flow statement, and others. *Id*.

A listed company is obliged, under the requirements of continuous disclosure, to submit a Securities Report to the Prime Minister. (SEA, Art. 24, CODBE, Art. 15, etc.). The contents of the required securities report are almost the same as those listed in (ii) above and include the aforementioned risk-related information and financial statements. A company that has a fiscal period of one year is obliged to submit every six months a Semiannual Report ((SEA, Art. 24-5) that must report the conditions of the company during six (6) months from the start of the fiscal year, and that must include and describe specific information regarding business risks and/or financial risks if any relevant material changes have occurred within the six month time period (CODBE, Art. 18, etc.)[2]

Financial statements of a listed company must be made according to the generally-accepted accounting standards (GAAS). Rules on Terms, Forms, and Manners of Preparation of Financial Statements, Art. 1. Additionally, the aforementioned financial statements must be audited and certified, in principle, by a certified public accountant or an audit corporation, who has no special interest in the company being audited. (SEA, Art. 193-2.)

The Prime Minister makes these documents available for public inspection for a certain period of time (SEA, Art. 25). The length of the period is five years for Registration Statements and Securities Reports, three years for Semiannual Reports, and one year for Extraordinary Reports. Such information is accessible on the Internet via the Electronic Disclosure for Investors' Network (EDINET -- the electronic

[2] Note that in June, 2006, the Financial Instruments Transaction Act (FITA) was enacted by revising the SEA. As a result, a Quarterly Report will have to be submitted for the fiscal year beginning April 1, 2008 and for each fiscal year, thereafter. FITA, Art. 24-4-7.

disclosure system for disclosure documents, such as Securities Reports, based on the SEA).

(2) In addition to the legal requirement of disclosure, a company that desires to be listed on a stock exchange must submit to the relevant stock exchange the corresponding application form and therein provide various information. See, for example, the Tokyo Stock Exchange Securities Listing Code, Guidelines for the Securities Listing Code, etc. Such information includes, for example, "a Securities Report for Listing Application," which must be attached to the application form. It is provided that this report is to be prepared in conformity with the CODBE, Art. 8, 15, etc. and therefore, the completed report must include the relevant financial statements and risk-related information. The report is published and made available to the public on the Web-site of the relevant stock exchange, etc.

After becoming a listed company, the company must disclose all information stipulated by the Timely Disclosure Regulations (TDR) provided by the Stock Exchanges. The TDR of the Tokyo Stock Exchange (TDRTSE), Art. 2, Para. 1, No. 2, requires a listed company to disclose information in the cases below. Subsidiary companies are not excluded with respect to the same kind of information (Id. Art. 2, Para. 2, No. 2). Exemptions exist in each case below when the amount is less than the specified range. In relation to the criteria of the exemptions, TDRTSE is more rigid than SEA described in (1).

a) Where there is a damage incurred by natural disaster or business operations.
b) Where litigation is commenced with respect to property rights or where the litigation is finalized with a judgment, etc.
c) Where a petition for an order of provisional injunction or for another analogous order is filed against business operation or business itself. Or where such a proceeding is closed by a court decision, etc.
d) Where an administrative office imposes an administrative sanction according to laws and ordinances or criminally accuses the company for a violation of law and ordinances.

Such information is also accessible for one month on the Websites of the major domestic stock exchanges (e.g., via the Timely Disclosure Network, so called "TD Net," of the Tokyo Stock Exchange). With respect to past (as opposed to current) information, accessibility to such information depends on the policy of the stock exchange. For instance, the Tokyo Stock Exchange discloses information of the last five years by means of the "TD Net Data Service." (The fee for this service is 35 thousand yen per month.)

2. Non-listed companies

Regardless whether a listed company or non-listed company, a stock company that was incorporated under the laws and regulations of Japan must also disclose its financial documents when requested to do so by its shareholders or creditors. Corporation Act (CA), e.g. Art. 442.[3]

[3] CA, Art. 440, Para. 1, provides that a company shall make a public notice of its balance sheet, but if a company chooses to make a public notice of it on a official gazette or a newspaper (*Id*. Art. 939, Para. 1, No. 1, 2.), no more than a summary of balance sheet is required. *Id.* Art. 440, Para. 2. A foreign

These financial documents are compiled according to the generally-accepted accounting practice (GAAP) (Corporation Act, Art. 431). Under GAAP, contingency liabilities (liabilities for damages regarding material cases or other similar liabilities), if any such liabilities exist, must be noted on a company's balance sheet (Corporate Accounting Regulation, Art. 134, No. 5). This explanatory note is not needed if a liability is not material. Whether a liability is material is determined in light of the "materiality principle" of Business Accounting Principles (GAAP in Japan. See "Rules on Terms, Forms, and Manners of Preparation of Financial Statements," Art. 1, Para. 2). Generally speaking, in the case where the company is an affiliate of a listed company, an explanatory note would be made based on similar disclosure criteria for a listed company described in 1 above.

Regardless of whether a listed company or a non-listed company, a "Large Company" (a stock company with a balance sheet listing capital of over five hundred million yen or liabilities of more than 20 billion yen, CA, Art. 2, No. 6.) is required to have an accounting auditor. CA, Art. 327, Para. 5, Art. 328. The accounting auditor audits the company's financial documents (CA, Art. 396, Art. 436, Para. 2). The accounting auditor must be either a certified public accountant or an auditing firm and must not have a specific interest in the company (CA, Art. 337). Even if not a Large Company, an "Open Company" (a stock company that does not have in its articles of incorporation a provision requiring approval by the company shareholders prior to the transfer of all or part of its issued stock, CA, Art. 2, No. 5) must have a corporate auditor or an accounting auditor (CA, Art. 327, Para. 1, 2 and 5). The corporate auditor audits the financial documents and others (CA, Art. 381, 384, Art. 436, Para. 1). The corporate auditor must not concurrently work as a director or an employee of the company being audited (CA, Art. 335).

2. Is there a right to know statute enabling one to obtain information from your government?

1. Law concerning Access to Information Held by Administrative Organs (LAI), Art. 3 provides that "Any person, ----, may request to the head of an administrative organ --- the disclosure of administrative documents held by the administrative organ concerned." The term "any person" indicates that foreign nationals are not excluded from the right to request disclosure.

2. In respect of "information concerning a legal person or other entity [excluding the State and local public entities] ("legal persons, etc.") or information concerning the business of an individual who carries on said business", exceptions exist in the cases below. However, "information recognized as necessary to be made public in order to protect a person's life, health, livelihood, or property" must be disclosed irrespective of these exceptions (LAI, Art. 5, No. 2).

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company which is not listed to a stock exchange in Japan but continuously carries its business in Japan shall be registered as a foreign company. *Id.* Art. 818. A registered foreign company shall make a public notice of its balance sheet or its equivalent, but, same as the case of a Japanese company, no more than a summary is required if the company chooses for it to be made on a official gazette or a newspaper. *Id.* Art. 819.

a) Information which poses a risk of harm to, if made public, the rights, competitive standing, or other legitimate interests of the said legal persons, etc. or of the individual.
b) Information which, upon the request of an administrative organ, was offered voluntarily on the condition that it not be made public. In light of the nature of the information and the circumstances, etc. at the time, the attachment of the condition such as not making public in ordinary case of a legal person or an individual must be considered to be reasonable.

In addition, LAI, Art. 7 allows the discretionary disclosure for public interest, providing that "[e]ven in the case that non-disclosure information is recorded in administrative documents pertaining to a disclosure request, when the head of an administrative organ finds that there is a particular public interest necessity, he or she may disclose that those administrative documents to the requester."

3. When a request for information disclosure has been denied, generally there are two ways to appeal. One way is to appeal under the Administrative Appeal Act (AAA), and the other way is to file a lawsuit demanding the rescission of the original disposition under the Administrative Case Litigation Act (ACLA). ACLA, Art. 8. It is also possible to file a lawsuit under the ACLA, even after an appeal under the AAA has been dismissed whether with or without prejudice.

The former method consists of both an objection to the administrative agency ordering the original disposition of non-disclosure (AAA, Art. 45 and its following provisions) and a request for review by a higher administrative agency (*Id*., Art. 14 and its following provisions). In the case that the administrative agency ordering the original disposition has its higher administrative agency, in principle, only the latter (the request for review) is possible (*Id.*, Art. 5, 6).

An administrative agency which has received an appeal under the AAA, must basically consult with the Information Disclosure and Private Information Protection Review Board (LAI, Art. 18). The members of this Review Board are appointed by the Prime Minister with the consent of both the House of Representatives and the House of Councillors (Act for Establishment of the Information Disclosure and Private Information Protection Review Board (Establishment Act), Art. 4). At present, there are five Sub-Committees of three members each, and the chief of each Sub-Committee serves as a full-time Board member (*Id.*, Art. 3, 6). Under certain circumstances, examinations and discussions must be conducted by the fifteen (15) Board members together, not by each sub-committee (*Id*., Art. 6, Para. 2). The said administrative documents requested for disclosure are disclosed to the Board in its course of conducting examinations and making decisions. (So-called "in-camera examination"; *Id.*, Art. 9). Also, the Board may examine and decide not only the legality of an administrative disposition in question but also the adequacy of such an administrative disposition (See AAA, Art. 1, Para. 1). An applicant is notified of the conclusion of the Board, and this conclusion is made public (The Establishment Act, Art. 16).

II. Status of business entities under criminal law in JAPAN

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

The term “persons” in Japanese criminal law does not include legal persons. A legal person may be punished only when there is a provision that specifically and explicitly provides punishment of legal persons. The Penal Code (PC) does not have any provisions to punish legal persons. However, the number of other laws and regulations that have provisions concerning punishment for legal persons is over 570 as of the end of 2003. These 570 laws and regulations represent two thirds of all laws and regulations with punishment.[4] Please note that a scholar points out that there are no criteria for differentiating between laws and regulations with punishment against legal persons and those without them.[5]

Most provisions to punish a legal person are formulated as a certain type of provision, the so-called *“Ryobatsu Kitei”* (Double Punishment Provision). With this provision a legal person is punished along with the natural person who actually committed the criminal conduct. In some very rare provisions, there is also a type of provision which is called a *“Sanbatsu Kitei”* (Triple Punishment Provision). In this case the following entities are punished: the actor, the legal person, and the representative(s) etc. of the legal person.

One example of a typical economic crime is the offence of insider trading (SEA, Art. 166, Para. 1 and 3, Art. 167, Para. 1 and 3), the penalty for which is provided in Art. 198, No. 19 (imprisonment with work for not more than three years, penalties of a fine not more than 3 million yen, or their cumulative impositions). In this connection, SEA, Art. 207, Para. 1, No. 2 provides as follows:

> [Art. 207] ‘In the case of a representative of a legal person (including associations without legal personality which have internal rules providing for a representative or administrator; the same shall apply hereinafter in this paragraph and the next paragraph), or an agent, an employee, or a worker[6] of other types, of legal or natural persons, who conducted an act in relation to business or property of such a legal or natural person in violation of the provisions set forth in each item below, the person who conducted such an act shall be receive a penalty. In addition, the juridical person shall receive the penalty of a fine set forth in each such item. Or the natural person shall receive such a fine as prescribed in each applicable article referred to in each such item:
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> Para. 1 (abbreviated)

[4] Tomomi Kawasaki, *Kigyo no Keiji Sekinin* [Corporate Criminal Liability], 2004, at 3; However, all laws and regulations concerning punishments for corporate crimes are not necessarily implemented actively. Corporate crimes are mostly settled by summary proceedings with fine of 500 thousand yen at maximum (Tetsuro Kawamoto, *Houjin ni Taisuru Seisai* [Sanctions on Corporations], Keiho Zasshi, vol.41, no.1, 2001, at 54).

[5] Tomomi Kawasaki, *Houjin no Shobatsu* [Punishment for Corporation], Keihou no Soten (3rd.ed. 2000), at 10.

[6] The definition of "a worker" in a so-called "*Ryobatsu-Kitei"* includes a person who is employed as an assistant by an *employee* of the business owner, as well as a person who is employed by the business owner. (Daishin’in [Great Court of Judicature), Judgment of Apr. 24, 1918, 24 Keiroku [KEIROKU] 392.

> Para. 2 Art. 198, from No. 1 to No. 10, or No. 19, Art. 198-3, Art. 198-3-2, or Art. 198-4: imposition of fine not more than 3 billion yen

To provide another example in respect of tax evasion (Corporation Tax Act [CTA], Art. 159, Para.1 provides that in cases where corporate tax was evaded by deception or other wrongful means, the representative, the agent, the employee, and the worker shall be imprisoned with work for not more than five years. Alternatively they may be fined not more than 5 million yen. Or they may be punished with their cumulative impositions), CTA, Art. 164, Para.1 provides as follows:

> [Art. 164, Para. 1] In a case where a representative of a legal person, or an agent, an employee, or a worker of other types, of a legal or a natural person, violated regulations as provided in Art. 159, Para. 1 (crime of tax evasion), Art. 160 (crime of non submitting final declaration), or Art. 162 (crime of submitting deceptive intermediate declaration) in the process of carrying out business pertaining to the said legal or natural person, the primary actor shall be punished. In addition, the said legal or natural person shall be fined pursuant to the aforesaid articles.

Also there are some laws that explicitly provide punishment for associations without legal personality. However, these are relatively few in number. (e.g. Income Tax Act, Art. 2, No. 8, CTA, Art. 2, Para. 8, Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade [Anti-Monopoly Act, or AMA], Art. 95, Para.2). On the other hand, there are no provisions that provide punishment for legal persons in cases of such crimes of arson, theft, or homicide as provided for in the Penal Code of Japan.

It is construed that, without having these specific provisions, provisions concerning punishments for a legal person cannot be applied to an association without legal personality.

4. What type sanctions are applied to business entities, as opposed to natural persons?

Under the existing law, criminal sanctions applied to business entities are limited to a fine (not less than 10 thousand yen, PC, Art. 15) and a petty fine (not less than one thousand and less than 10 thousand yen, PC, Art. 17). There are only financial penalties.[7] However, property may be confiscated as a subordinate punishment (PC,

[7] Besides criminal sanctions, there are administrative sanctions such as order of dissolution (CA, Art. 824, etc.), surcharge (AMA, Art. 7-2, etc.), heavy additional tax (General Law of National Tax, Art. 68), suspension of business operation (Law Concerning Regulations of Money Lenders, Art. 36, etc.), revocation of business approval and license (Law Concerning Control of Entertainment and Amusement Business and Fairness of Operation, Art. 8, etc.), public announcement (Act for Planning the Utilization of the National Land , Art. 26, etc.), monetary penalties (SEA, Art. 79-7, etc.), petty fine (CA, Art. 976, etc.), suspension of nomination for government procurement (regulated by ministries or local governments. For example, the Ministry of Land Infrastructure and Transport has an outline and a standard of regulation concerning matters like suspension of nomination.) These sanctions are applied only when provided specifically and explicitly.

Art. 9 and 19. Supreme Court, Judgment of May 22, 1963, 17-4 KEISHU 457).[8] On the other hand, a natural person may be subject to such principal punishment as: the death penalty, imprisonment with work, imprisonment, fine, misdemeanor detention, or petty fine. In relation to a subordinate punishment they may be subject to confiscation. PC, Art. 9. Criminal law in Japan does not contain injunctions or restitution orders. The Code of Criminal Procedure of Japan does not introduce the system of incidental claim by a private individual to criminal procedure ("action civil" proceedings).

The maximum amount of fine that a legal person can receive is equal to that of a natural person in most laws and regulations. Therefore, it has been repeatedly criticized that fines for legal persons are too small to have deterrent effects as expected of criminal sanctions. However, since the 1990s, there have been laws and regulations enacted which have higher maximum amounts of fine for a legal person.[9]

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants?

a) What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?

A legal person is punished only in cases where there are specific and explicit laws or regulations that provide punishment for legal persons, as explained in our answer to Question 3. In cases where there are such laws or regulations, criminal liability may be attributed to a corporation (1) when a representative of the business entity committed an illegal conduct or (2) when a servant of the business entity, other than a representative, engaged in illegal conduct. The business entity must also have been proved negligent in the appointment and/or supervision of the servant.

b) If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?

A legal person is punished only in cases where there are specific and explicit laws or regulations, as explained in our answer to Question 3. In such cases, a legal person, as a business owner, is guilty of a crime where it has the intention of, or is negligent in, the illegal conduct. (Supreme Court, Judgment of Mar. 26, 1965, 19-2 KEISHU 83) (*liability of negligence*). Where a representative of a legal person engaged in illegal

[8] Law Concerning Punishments on Organized Crimes, Art. 8, specifically and explicitly provides confiscation from an association and expands the range of cases where confiscation may be imposed than that is provided in PC, Art. 19.

[9] As of the end of 2003, among 570 laws and regulations that provide punishments for legal persons, there exist 51 laws and regulations with the maximum fine of not more than 100 thousand yen, 300 with that of not less than 100 thousand yen and less than a million yen, 149 with that of not less than a million yen and less than 10 million yen, 16 with that of not less than 10 million yen and less than 100 million yen, and 54 with that of not less than 100 million yen. Kawasaki, *supra* note 3, at 4.

conduct, the intention and/or negligence of the said representative is recognized as the intention and/or negligence of the legal person. When a servant of the business entity other than a representative engaged in illegal conduct, the negligence of the legal person is demonstrated where there is negligence in the appointment and/or supervision of the said servant by the representative(s). Such representatives have a duty of care in the appointment and/or supervision. The Supreme Court (Judgment of Mar. 26, 1965) held, as described below, that negligence of a legal person was presumed (*presumption of negligence*), unless a representative demonstrates that he/she thoroughly fulfilled the duty of care (*absence of negligence*).

> For a case where a business owner is a natural person, it has been construed, as the effect of the law, that a *Ryobatsu Kitei* provision presumes the existence of negligence that the business owner should not have exercised due care in appointment, supervision, and/or other care for preventing illegal conduct, where his/her agent, employee, or worker of other types, engaged in the illegal conduct. Thus, the business owner also has criminal liability unless there is sufficient evidence of such care having been taken by the business owner. This effect of the law has been explained in precedents of the Supreme Court. This interpretation of the effect of the law should be applied to the case here in question where the business owner is a legal person (stock cooperation) and the actor is a worker other than the representative(s).

There is no Supreme Court precedent after the World War II concerning the content of the duty of care as discharge conditions for a business owner. No precise and definite test can be found among precedents of lower courts. However, it is definite that all precedents require strict duty of care in which a business owner has made efforts in preventing illegal conduct by giving active and specific instructions, beyond the general and abstract warnings, in preventing illegal conduct. As a result, there have been only a few precedents where presumption of negligence was overridden.[10]

The following is an example of precedents where discharge was denied regarding the duty of care of a business owner. A business owner which was a corporation was prosecuted due to it requiring workers under the age of 18 to work during late hours in violation of the Labor Standard Act (LSA), Art. 62, Para.1. In this case, the court held that “giving general and abstract warnings to prohibit late hour work is not sufficient. Efforts must have been made in preventing illegal conducts by giving active and specific instructions against the violation.” The fact that representative(s) or management staff just had intention not to make young workers work during the late hours did not meet the requirement. (Tokyo High Court, Judgment of Feb.19, 1973, 302 Hanrei Taimuzu [HANREI TAIMUZU] 310.) For an example of precedents where discharge was allowed, there is a case where an ironwork company, a contractor of construction, was prosecuted for the death and injury of employees in the process of construction as a violation of then LSA Art. 42 (measure of prevention of danger). In this case, the court found that the prevention requirement was reached. However, it held that “general and abstract warnings and cautions against violations

[10] Against those precedents, there are not a few criticisms that, in a large enterprise, it is impossible for the representative(s) to supervise, by him/herself, lower level employees; so the duty of care required for a legal person is far stricter and virtually different from the general duty of care in criminal law which is assumed to be able to be fulfilled by a general average person, and therefore it brings out virtually a strict liability.

by a business owner are not sufficient for the discharge on the ground of absence of negligence, and the business owner is required to take appropriate and specific measures enough to prevent effectively illegal conduct." (Takamatsu High Court, Judgment of Nov. 9, 1971, 275 HANREI TAIMUZU 291)

c) What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?

Under the criminal law of Japan, there are provisions in which a natural person's act may be attributed to a business entity but there are basically no provisions providing the other way round. However, in case of offenses that have so called *"Sanbatsu Kitei"* provisions (e.g. AMA, Art. 95-2, Vessel Safety Act, Art. 18, Para. 3, Civil Aeronautics Act, Art. 154, Para. 2, Food Sanitation Act, Art. 77), in certain conditions, not only a primary actor and the business owner, but also the person in control, such as a representative, may be punished. There are only a few provisions of this kind, though. For example, AMA, Art. 95-2 provides as follows, with regards to Id. Art. 3 ("No entrepreneur shall effect private monopolization or unreasonable restraint of trade." Penalties pursuant to Art. 89, Para. 1 is imprisonment with work for less than three years or a fine no more than 500 million yen):

> In case of a violation of Article 89, Para.1, No.1, Article 90, No. 1 or 3, or Article 91 (excluding No. 3), the representative of a legal person (excluding those who come under a trade association in case of violation of Article 90, No.1 or 3) who failed to take necessary measures to prevent such violation while knowing of the existence of such a plan or who failed to take necessary measures to rectify such a violation while knowing of the existence of such a violation, shall also be punished by such fines as provided for in the relevant Articles.

As described above, there are no Japanese laws and regulations concerning homicide by business entity. However, there have been cases of death with the process of business activities, which drew social interest. In spite of this, a legal person may not be guilty without any specific regulations,[11] nor are there doctrines in which liability of a legal person may be attributed to a natural person. So generally, the specific natural persons who took charge of such business spots or were the representatives of such legal persons have been individually criminally liable by being punished for "death caused by negligence in the conduct of business." (PC, Art. 211)[12] However,

[11] For example, Laws Concerning Punishments for Pollution Crimes Causing Damage to Human Health has provisions that punish legal persons.

[12] E.g. "type of crimes in business disaster," the Case of Fire at Kawaji Prince Hotel, Utsunomiya District Court, Judgment of May 15, 1985, 17-5 and 6 Keiji saiban geppou [KEISAI GEPPO] 603, decision of appellate court for one of the accused is Tokyo High Court, Judgment of Feb. 12, 1980, 1233 Hanrei Jihou [HANREI JIHOU] 30, the decision of the last instance is Supreme Court, Decision of Nov. 16, 1999, 44-8 Keiji hanreishu [KEISHU] 744; "type of crimes in product liability," the Case of AIDS Caused as Drug Disastar, Osaka District Court, Judgment of Feb. 24, 2000, 728 HANREI JIHOU 163, the decision of appellate court is Osaka High Court, Judgment of Aug. 21, 2002, 1804 HANREI JIHOU 146; and "types of crimes in environmental disaster," the Case of Chisso Kumamoto Minamata Disease, Kumamoto District Court, Judgment of Mar. 22, 1979, 11-3 KEISAI GEPPO 168, the decision at appellate court is Fukuoka High Court, Judgment of Jul. 9, 1982, 35-2 KOUKEISHU 85, decision of the last instance is Supreme Court, Decision of Feb. 29, 1988, 42-2 KEISHU 314.

there has been a criticism in this regard that seeking only the individual's liability is insufficient. For example where it may not be able to sufficiently foresee the danger of harming human lives based on each individual natural person's ability. Or, alternatively where the case may be primarily caused by an imperfect system or structural fault of the organization that cannot be attributed to an individual. In these cases, laws and regulations which specifically deal with criminal liability of legal persons are needed.[13]

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Under Japanese criminal law, complicity in a crime includes within its scope three different categories, namely being a co-principal, incitement (abetting), and being an accessory (aiding). Further, for a few crimes, the offence of instigation is also provided. Given below is a detailed discussion of the different kinds of complicity as well as the law of conspiracy in Japan.

Co-principals

Co-principals mean "more than two persons jointly committing a crime" (Penal Code, Art. 60). Jointly committing a crime means jointly committing a criminal act based on a common shared intention to jointly commit the crime. When a crime is jointly committed by several persons, each of these persons is liable for all that is caused by him/herself and/or other actors.[14] (Note that when a crime of murder is committed jointly, the persons who committed it are co-principals, and they all are to be punished for the "offense of murder," but this does not mean that the co-principals are additionally to be punished for the "offense of co-principal." There is no such independent offense as "offense of co-principal." The effect of the application of Art. 60 of the Penal Code is to hold someone accountable for a result even when it is directly caused by other actors.)

In Japan, the punishment for incitement is not different from that stipulated for principals, as discussed below. In most cases, a person who commits a crime is however punished as a co-principal and in only a few cases is the accused convicted for incitement or being an accessory: punishment of the ringleader in the perpetration of a crime merely as an inciter, and not as a principal, would not be in keeping with popular sentiments of Japanese society.[15] Thus, under Japanese law a rather broad and all embracing interpretation of the legal notion of principal has been adopted.

In many cases of serious crimes such as murder or robbery, even those who did not actually commit the act of killing or robbing are invariably punished as co-principals.

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[13] Hiroshi Itakura, *Kigyo Hanzai no Riron to Genjitsu* [Theory and Reality of Corporate Crimes], 1975; Kawasaki, *supra* note 3, at 372.

[14] Masahide Maeda, *Keihou Souron* [General Theory of Criminal Law], at 375; Minoru Otani, *Keihou Souron* [General Theory of Criminal Law], at 229. An example is the case where more than one offender fired a gun and murdered a person. All of the offenders should be accused of murder no matter whose bullet actually hit the victim. However, it may not mean that they will be awarded the same punishment; each sentence is to be decided individually depending on the gravity of the act committed by each and the degree of the involvement of each. Actual sentences may vary among co-principals.

[15] Maeda, *supra* at 409.

Also the conviction of other co-principals is not necessary to punish a person as a co-principal.
Under criminal law in Japan, a person younger than fourteen years old cannot be punished When a person coerces/intimidates a person under fourteen years of age to commit a crime[16] or makes him/her carry substances like prohibited/scheduled drugs without his/ her knowledge. The person who masterminds the crime is punished as the principal, even though no direct criminal act is committed by him/her. This is called "the indirect principal theory." (The doctrine of indirect principal is a different and distinct concept from that of co-principal.)

In addition, there is "the conspiracy co-principal theory" that deals with punishments of co-principals as those who are engaged in a conspiracy without actually participating in conducting the criminal act.[17] The mere existence of a conspiracy will not suffice. He/she cannot be punished for conspiracy unless the criminal act is committed by one or more parties to the conspiracy in pursuance of the conspiracy.[18] (Note that when the crime of murder is committed in conspiracy, the persons who committed it are all to be punished for the "offense of murder," but not to be punished additionally for the "offense of conspiracy co-principal." The substantial implication of the conspiracy co-principal theory is that persons who are engaged in a conspiracy to commit murder (but who do not have a direct hand in killing) are also punished for the "offense of murder" in the same way as the persons who actually committed murder.

Japan is a signatory to the United Nations Convention against Transnational Organized Crime and the Diet gave its approval to the same in 2003. The provisions of the Convention have not been fully incorporated into domestic law. Evidence of its partial incorporation is found in the "Law on Punishments for Organized Crimes and Control on Criminal Profits" legislated in 2001. It provides for cumulative punishments for certain organized crimes and imposes controls on money laundering.

A Bill is pending before the Diet to criminalize participation in an organized criminal group (as of July, 2006). There exist a range of diverse opinions on the issue of punishment of conspirators. Some are of the opinion that no one should be held guilty unless the crime has actually been committed by any one of the parties in pursuance of the conspiracy. Others are of the view that punishment can be awarded although there is much controversy here as to the nature of crimes for which offenders may be punished. Should it be limited to transnational crimes in which part of the illegal conduct is carried out outside the country? And also what type of conduct by a party to the conspiracy would qualify for punishment?

Incitement
A person who incites another to commit a crime is punished for incitement. (For instance, a person may be punished for incitement of murder, but this does not mean that the person is to be punished for two separate offenses: the "offense of murder" and the "offense of incitement.") Based on Penal Code, Art. 61, Para. 1, incitement is punished with the same penalty as the principal including cases of crimes under

[16] Supreme Court, Judgment of Sept. 21, 1983, 37-7 KEISHU 1070.
[17] Sup. Ct, J of May 28, 1958, 12-8 KEISHU 1718.
[18] Maeda, *supra* at 414; Otani, *supra* at 240.

special laws and regulations.[19] Besides, a person who incites the one who incites the person who commits the illegal act is also guilty of incitement. (PC, Art. 61, Para.2)

An inciter may be punished only when the person who was incited actually commits a crime. But sentencing of the principal is not necessary for punishing the inciter.[20] As the concept of principal is quite expansive in Japan, only a few are punished for the offense of incitement. Statistics show that in 1996, out of all those convicted of complicity, 97.4% were convicted as co-principals and only 0.3% for incitement. In a majority of cases the conviction for incitement was for concealment of the criminal and destruction of evidence.[21] Japanese criminal law in certain serious crimes such as murder or arson, regards preparation of the same as an offense.[22] The Japanese Penal Code however does not specifically mention the offense of incitement for preparation, and there are academic propositions both in support and against the notion.

In addition, for certain types of crimes incitement is punishable even where the person who was incited did not actually commit a crime. (Penal Regulations on Control of Explosives, Art. 4 “Instigation for using explosives with objective of threatening public security, human lives, and property”)

Being an Accessory

A person is punished for being an accessory by reducing the punishment for the corresponding principal offense (PC, Art. 62).[23] (For instance, someone may be punished as an accessory to murder, but this does not mean the person is to be punished for two separate offenses: the “offense of murder” and the “offense of being an accessory.” Being an accessory is defined as a conduct that is carried out by a person other than the principal and that facilitates the criminal act of the principal.[24] Both material support such as supplying weapons, tools or space and intangible support such as supplying information that facilitates the crime or encourages the

[19] However, it does not mean that actual sentencing is to be the same with the principal and is decided individually depending on viciousness. It may be the same with the principal's and may be less severe. While, regarding crimes that have only penalties of misdemeanor detention (not less than one day and less than thirty days) or petty fine (not less than one thousand yen and less than ten thousand yen), incitement is not punished except for cases with special provisions (PC, Art. 64), crimes in question in this survey are not so trivial as those crimes so that the stipulation would be irrelevant here.

[20] Daishin’in (Great Court of Judicature), Judgment of Dec. 1, 1911.

[21] Maeda, *supra* at 374, 429.

[22] Preparation signifies preparatory conducts before the commencement of the act of crime. To be punished for preparation, a person needs to have committed preparatory conducts with the objective of committing a crime by him/herself or making another to commit one. Depending on types of crimes, a person may be punished for preparation only when he/she had the objective of actually committing a crime by him/herself. As the preparation offense is limited to only a few type crimes, each criminalization of preparation as well as each penalty is provided respectively for each crime. Penalties for preparation are less severe than those for the crime per se in most cases.

[23] The degree of reduction is provided in PC, Art. 68; i.e. death penalty is reduced to imprisonment with work, or imprisonment, for life or not less than ten years and not more than thirty years; imprisonment with work, or imprisonment, for life is to imprisonment with work, or imprisonment, for not less than seven years and not more than thirty years; halving length of imprisonment with work or imprisonment with limits of length (generally not more than twenty years). (PC, Art. 68, Art. 14) Accessoryship may not be punished concerning crimes only with penalties of misdemeanor detention or petty fine, unless there is a specific provision (PC, Art. 64).

[24] Sup. Ct, J of Oct. 1, 1949, 3-10 KEISHU 1629.

formation of the criminal intent fall within the ambit of being an accessory. Also being an accessory by omission is recognized as a type of being an accessory.[25]

As mentioned above, however, in a majority of the cases the accused are punished as principals as the concept of principal has been given an expansive interpretation in Japan. Usually, a person who is present at the scene of the crime is likely to be charged with having jointly carried out the crime so as to be treated by law as one of the principals. For this reason, the number of convictions for the offense of being an accessory is small. Statistics show that in 1996, out of all accused convicted of complicity, only 2.3% were convicted for being an accessory. The majority of cases where the accused were convicted for being an accessory pertained to the crimes of gambling and lottery.[26]

Punishments for incitement to become an accessory is imposed by reducing the punishment for the corresponding principal offense as is punishment for being an accessory (PC, Art. 62, Para. 2). Being an accessory to an accessory was held to be a punishable offense (as a type accessory crime).[27] It has further been interpreted that being an accessory to incitement is also a punishable offense (as a type of accessory crime),[28] though there are no specific and explicit provisions codifying the same.

A person is not punished for being an accessory unless the crime is actualized by the principal.[29] Japanese criminal law recognizes the offense of preparation for certain serious crimes. Where a crime was not fully realized and was aborted at the point of preparation, an accessory has usually been held to be a co-principal of preparation as co-principals of preparation are recognized by precedent.[30] Further, for a few specific types of crimes, punishment for being an accessory offense does not require the actual commission of the crime by the principal (National Public Service Law, Art. 111, Minor Offenses Act, Art. 3, etc.).

Relationship with punishments for overseas criminals[31]

Since Japanese law does not clearly provide any specific laws or regulations for punishment of accomplices located overseas the matter has been determined by legal interpretation. In most cases, interpretation has brought them within the ambit of the law so as to punish them as domestic criminals. The legal position in different scenarios is discussed below.

(i) where a conduct of the principal is committed domestically, and conspiracy, incitement, or being an accessory is committed overseas

Laws in Japan treat any crime of which a part is committed domestically as a domestic crime. Therefore in a case where a person who is party to a conspiracy is

[25] Osaka High Court, Judgment of Oct. 2, 1987, 675 HANREI TAIMUZU 246.
[26] Maeda, *supra* at 434.
[27] Sup.Ct, J of Jul. 17, 1969, 23-8 KEISHU 1061.
[28] Daishin'in (Great Court of Judicature), Judgment of Mar. 10, 1937, 16 KEISHU 299. Note that this is a case of punishment on a person who aided another person who incited a third person who committed incitement.
[29] Maeda, *supra* at392; Otani, *supra* at 246.
[30] Sup. Ct J of Nov. 8, 1962, 16-11 KEISHU 1522.
[31] About discussions in this paragraph 4 , see Yuki Furuta, *Kokugaihan to Kyohan* [overseas criminals and complicity], in *Keiho Kihon Koza* [Basic Courses of Criminal Law].

found a principal pursuant to the conspiracy co-principal theory, the person would be punished as a domestic criminal, since a part of the crime is committed within the domestic boundaries.

Actual commission of the crime by the principal is a constitutive element of the offenses of incitement or being an accessory. Because the criminal conduct of the principal committed domestically means a part of the constitutive elements of the offenses of incitement of being an accessory was committed domestically, the inciter or accessory would be punished as domestic criminals.

(ii) where the conduct of the principal is committed overseas, and conspiracy, incitement, or being an accessory is committed domestically

As the conspiracy itself is considered one of the constitutive elements of the offense, a conspirator would fall within the purview of a domestic criminal.
An inciter or accessory him/herself would be treated as a domestic criminal when incitement or being an accessory is carried out domestically, even though the act of the principal which is an essential element of the crime, takes place overseas, regardless of punishability of overseas criminals. The punishability of overseas criminals is regarded here as having no impact on the establishment of the offenses of incitement or being an accessory, but as only a matter of conditions for punishments of each criminal. (Note that, in this case, the principal is not to be punished unless there is a provision that allows punishment for overseas criminals for the said type of crime.)

(iii) where both the conduct of the principal, and conspiracy, incitement, or being an accessory are committed overseas

The principal is to be punished if there is an express provision for punishment of overseas criminals, for that specific offense. The same would apply to the case of conspiracy. For a crime which has a provision that overseas criminals are to be punished, there are no explicit provisions stating whether those who committed incitement or were accessories may be punished as overseas criminals in the same way. But it is construed that incitement or being an accessory would be covered by the said provision of punishment for overseas criminals.
Another complicated scenario is a case where a crime is committed with the involvement of both a Japanese national and a non-national. A situation may arise where the law permits the national to be punished as an overseas criminal, but there is no provision for punishment (for overseas criminals) of non-nationals. An illustration of such a situation is the crime of murder. Under Japanese criminal law, different results ensue depending on the nationality of the victim of the murder. Where the victim is a Japanese national and the accused is a non-national, he/she may be punished in the same way as an overseas criminal. If however we examine a hypothetical where the victim is a non national then there is no specific legal provision on the issue and the matter is left open for judicial interpretation. The legal position with respect to different scenarios is discussed below.

(iv) where there is a provision of punishment for an overseas criminal in relation to the principal and no such provision in relation to the accomplice

A case where, for example, in a foreign country, (i) a national and a non-national kill a person in pursuance to a conspiracy, (ii) a non-national incites a national to commit a murder, or (iii) a non-national aids a murder committed by a national. (PC, Art. 3, Para. 6, and Art. 3, Para. 2, No. 2) Where the conspiracy is regarded as the conduct of principal by "the conspiracy co-principal theory," the said national would be punished as a co-principal. A national who commits murder in a foreign country with incitement or with a non-national as an accessory will be punished. But a non-national who takes part in the conspiracy and a non-national who incites or aids would not be punished because there are no legal provisions that would bring them within the purview of overseas criminals.

(v) where there is no provision of punishment for an overseas criminal in relation to the principal but there is a legal provision for an overseas criminal in relation to the accomplice

This would apply in a situation where, for example, a national incites or aids a non-national to commit a murder in a foreign country. This would be most relevant to the present survey. As mentioned above, the provisions of punishments for overseas criminals would be interpreted to include within their ambit incitement and being an accessory to the said crime. Accordingly such a national could be punished as an inciter or accessory. Note that, if the conduct of the national is proved conspiracy so that it is regarded as the principal conduct, then the provision of punishment for overseas criminal of nationals is applied to the principal national as discussed in the case of "a" above.

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

Identification of the actor, etc.

As was discussed in the answers to Question 3 and 5, business entities (other than individuals) such as legal persons and/or other organization/associations (hereinafter, the term "legal person" refers to all such business entities) are not punished under laws of Japan unless the legal provision specifically provides for punishment of legal persons. In connection with the major crimes in question in this survey including genocide, crimes against humanity, war crimes, and so on, while individuals can be punished for these crimes under charges of murder, injury, kidnapping, human trafficking, rape, and so on, legal persons cannot be punished for these crimes since there is no provision specifically providing for the punishment of legal persons in connection with these offenses.

As mentioned in answer to Question 5, as to the punishment of legal persons under the provision of the so called *"Ryobatsu Kitei,"* a legal person can be punished under the legal provisions pertaining to breach of the duty of supervision over servants who commit the crime. A legal person can be punished either for a principal-like role and

corresponding actions or for a complicity-like role and corresponding actions/omissions. For example, not only in cases where the representative of a legal person committed a criminal act but in cases where the aforementioned representative incited employees to commit a criminal act or overlooked their committing a criminal act (complicity-like role and commitment by a legal person), such a legal person is to be punished under provisions for the punishment of legal persons.

However, it is possible that no person in the business entity is identified as being in charge though, at the same time, certain servants of the said legal person have unmistakably committed a crime.[32] If the person in charge is not clearly identifiable it would be difficult to prosecute and punish the legal person as there are substantive legal opinions against this proposition.[33]

Small amount of fine

The only penalty awarded to legal persons is the imposition of a fine and the amount of a fine was the same as that could be imposed on natural persons. As mentioned above, recently in some cases the fine that can be imposed upon legal persons has been greater than that can be imposed upon natural persons. Japanese laws, drafted long ago, however continue to stipulate the same penalty of fine regardless of whether the accused is a natural or legal person. Imposing a fine of several hundred thousands yen, by itself, is unlikely to have any effect as a sanction on multinational enterprises.

Prescription (Statute of Limitation)

Under Japanese laws, charged prescriptions are provided according to the severity of penalty awarded for the offence concerned. The Code of Criminal Procedure, Art. 250, No. 6 provides that the length of the charged prescription is three years with regards to offenses which carry punishment of less than five year imprisonment with work or imprisonment, or fine. When the penalty entailed is more than five years, the length of charged prescription is longer. However, as legal persons may only receive penalties of fine, the charged prescription for a legal person is to be complete in three years. (Supreme Court, Judgment of Dec.21, 1960, 14-14 Keiji hanreishu [KEISHU] 2162) Due to this rule of charged prescriptions there may be cases where natural persons may be awarded punishment but the legal person is exempt from punishment.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

[32] An example of this is a case where no one can state specifically which act and who has caused leakage of poisonous substances though poisonous substances have unmistakably leaked from the factory.

[33] Negative legal opinions are in Makoto Mitsui, *Houjin Shobatsu niokeru Houjin no Koui to Kashitsu* [Acts and Negligence of Legal Persons in Punishments for Corporation], and in *Koji Fujinaga* (then councilor of Ministry of Justice), *Houjin Shobatsu nikansuru Rippojo no Shomonndai* [Proplems in Legislation concerning Punishments for Corporation], 23-1/2 Keiho Zasshi; A positive legal opinion is in Fumio Kanazawa, *Houjin no Keijisekininn to Ryobatsukitei* [Criminal Liabilities of Corporation and “Robatsukitei”], *Keiho Kihon Koza* [Principles on Criminal Law], Vol. 2.

The four Geneva Conventions and their additional Protocols (hereinafter referred to as "the Geneva Conventions and the Protocols"):

(1) Accession to the Geneva Conventions and the Protocols

Japan acceded to the Geneva Conventions in 1953. It deposited the instrument of accession to the additional Protocols on August 31, 2004.[34]

(2) Incorporation into Domestic Criminal Law

There are two ways of incorporating international conventions, treaties, protocols, etc. into domestic law: (a) through existing law or (b) by making a new law.

A new law was enacted in 2004 as discussed below, but this does not mean that it was not possible to implement the Geneva Conventions (or part thereof) in Japan prior to the enactment of the new law. As in (a) above, it is possible to apply the Geneva Conventions through the Penal Code, the Law concerning Punishment of Physical Violence and Others, and the Law for Punishing Compulsion and Other Related Acts Committed by Those Having Taken Hostages. For example, the crime of murder stipulated in the Penal Code, Art. 199 applies to the murder of a prisoner of war.

The bill of the "Law concerning Punishment of Grave Breaches of International Humanitarian Law (hereinafter referred to as 'Punishment Law')" was submitted and the "Punishment Law" was passed in the 159th session of the Diet in 2004 (June 18, 2004, Law No. 115). The objective of this Law is to contribute to the correct implementation of international humanitarian law (in conjunction with punishment by the Penal Code, etc.) through the punishment of grave breaches of (and as stipulated in) international humanitarian law in international armed conflicts (Punishment Law, Art. 1). The Punishment Law newly defines the following types of conduct as crimes: destruction of historic monuments, etc., to which special protection has been given (Punishment Law, Art. 3; First Additional Protocol, Art. 85, Sec. 4(d)), delay in the repatriation of prisoners of war (Punishment Law, Art. 4; First Additional Protocol, Art. 85, Sec. 4(b)), transfer of own civilian population into occupied territory (Punishment Law, Art. 5. First Additional Protocol, Art 85, Sec. 4(a)), and delay in the repatriation of civilians (Article 6, Punishment Law, Art. 6; First Additional Protocol, Art 85, Sec. 4(b)).

Other International Instruments

(1) Examples of Type (a) Incorporation

Many acts covered by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the International Convention Against the Taking of Hostages (Convention Against Hostage-Taking), both of which were entered into by Japan in 1987, are punishable by

[34] The Constitution of Japan "forever renounce[s]" "the threat or use of force" (Art. 9, Sec. 1), and stipulates that "land, sea, and air forces, as well as other war potential, will never be maintained" (Art.. 9, Sec. 2). Furthermore, it states that "the right of belligerency of the state will not be recognized." In reality, there are Self Defense Forces (SDF) but they were not deployed overseas until the 1990s. Even at present, they do not engage in combat. Therefore, there has been an understanding that it is inconceivable for the SDF to commit war crimes. The reason for the delay in the ratification is not that Japan allows war crimes. Rather, the delay is due to the fact that there is strong opposition to the dispatch of the SDF overseas, and the preparation for the ratification of the Geneva Conventions per se was criticized as such preparation presumed that Japan would go to war.

criminal law in Japan. For example, the Penal Code, Art. 199 applies to murder, and Id. Art. 204 to 206 etc. apply to injury.

The Penal Code, Art. 4-2 makes it possible to punish overseas criminals in general when international treaties, such as the two Conventions mentioned above, oblige Japan to conduct criminal procedures against certain acts, even when those acts have been committed outside of Japan.

In addition to these Conventions, the said provision (Penal Code, Art. 4-2) is applicable with regard to the Convention on the Physical Protection of Nuclear Material, the Convention on the Safety of the United Nations and Associated Personnel, the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism (Convention on the Financing of Terrorism), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(2) Examples of Type (b) Incorporation

Upon becoming party to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation in 1974, the Law concerning Punishment of Acts Causing Danger to Aviation and Others (1974 Law No. 87) was enacted as a special law in the Penal Code.

There are other examples, such as (i) the enactment of the Law for Punishing Compulsion and Other Related Acts Committed by Those Having Taken Hostages (1978 Law No. 48) with regard to the Convention Against Hostage-Taking and (ii) the enactment of the Law concerning Punishment for the Financing of Criminal Acts with the Intent of Threatening the Public (2002 Law No. 67) with regard to the Convention on the Financing of Terrorism.

9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

Japan has not yet signed the ICC Statute. Therefore, there have been no modifications of the provisions of the ICC Statute under Japanese law.

10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

Effect of International Law in Japan (premises)

The Constitution of Japan, Art. 98, Para. 2 provides: "The treaties concluded by Japan and established laws of nations shall be faithfully observed." Because of this provision, treaties are said to have effect as domestic law without transformation. This understanding is not only the common view among academics specializing in constitutional law[35] and international law[36] but also widely shared by the government and the courts.

[35] Nonaka,Toshihiko, *et al*., *Kenpo II* [Constitutional Law II) (3rd ed. 2001), at. 404.
[36] Sugihara, Takane, *et al*., *Gendai Kokusaiho Kougi* [Modern International Law Lectures), (3rd ed. 2003), at 34.

The formal effect of international law within domestic law is that international law generally ranks above domestic statutes and below the Constitution. In accordance with the Constitution Art. 76, Para. 3 and Art. 99, judges are bound by and have the obligation to respect international law which has become Japanese law through the Constitution.

Direct Applicability of International Law

Direct applicability of international law refers to the question of whether international law can be directly applied within Japan without further measures.

There is no precedent in Japan that clearly determines what kind of treaty has direct applicability. However, the leading view is that international law is directly applicable in principle since it is given a domestic effect (as explained in the previous section), and the direct applicability is exceptionally denied (i) when the State Parties to the treaty had intended to deny its direct applicability, or (ii) when the content of the treaty is not clear.[37]

Punishment of International Crimes Not Incorporated into Domestic Criminal Law

According to the view described above, it might seem possible for domestic courts to directly apply the provisions on international crimes that appear in treaties without incorporation into domestic criminal law, except in cases where the treaty itself is interpreted as having no intention of being directly applied.

Nevertheless, to this date, at least with regard to international criminal law, Japan has only adopted two methods of application: 1) application through existing domestic criminal law, and 2) application through the enactment of a new law criminalizing specific acts by using the definitions provided in the treaty or by establishing a different definition.

Such an approach is probably guided by the principle of the legality of crime and punishment derived from the Constitution, Art. 31. in that a crime and corresponding penalty must be defined by law (*nulla poena sine lege*).

Thus, in practice, Japanese courts do not exercise jurisdiction over international crimes that are not incorporated into the criminal law of Japan.

11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

As discussed in detail in response to Questions 3-5, a business entity other than an individual (mainly a legal person) is not prosecuted under Japanese criminal law, unless the legal provision, such as *"Ryobatsu Kitei"*, specifically provides for the punishment of legal persons. Even where a legal person is complicit in a crime as an inciter or as an accessory, such a legal person cannot be prosecuted for complicity

[37] Kodera Akira, *et al*., *Kougi Kokusaiho* [Lecutres on International Law), (2004), at 108.

(incitement or being an accessory) unless there is a legal provision providing for the punishment of a legal person regarding the crime committed by the actor (principal).

Ratification and incorporation of the Geneva Conventions is discussed in the answer to Question 8. As mentioned in the answer to Question 9, Japan has not signed nor ratified the International Criminal Court Statute. Nor has Japan signed or ratified the Genocide Convention, and, consequently, the crime of genocide has not been incorporated in domestic laws. In the absence of specific domestic legal provisions defining and including crimes against humanity, grave human rights violations such as apartheid and some types of persecution may escape criminal prosecution altogether in Japan or may fall within the purview of minor offenses or misdemeanors. However these provisions lack extra territorial application and cannot be invoked for prosecuting overseas criminals. For instance, intimidation (PC, Art. 222) and compulsion (*Id.* Art. 223) lack extra territorial application.
When a natural person commits a crime akin to genocide, crime against humanity, war crime, or torture, he/she may be punished under the ordinary criminal law provisions of murder (PC, Art. 199), injury (*Id*, Art. 204, 205), kidnapping or human traffic (*Id.* Art. 224 through 227), rape (*Id.* Art. 177), gang rape (*Id.* Art. 178-2) capture and detention (*Id.* Art. 220, 221), or for complicity (incitement or being an accessory) of these in regard to these offenses, there are provisions for the punishment of overseas criminals. *Id.* Art 3, 3-2). However, as these offenses are not accompanied by specific provisions to punish legal persons, a legal person cannot be prosecuted or punished for the aforesaid crimes within the purview of the Japanese criminal law. For the same reason noted above, where a legal person incites or aids in one of these crimes, that legal person cannot be prosecuted or punished as there is no provision providing for the punishment of a legal person. The “Law concerning Punishments for Serious Illegal Conducts against International Humanitarian Law”, described in the answer to Question 8, also lacks provisions for the prosecution and punishment of legal persons. Where an employee of a legal person supplies, as a business activity of the said legal person, poisons or explosives to an perpetrator of a murder, and where the perpetrator does not have a required license for the acquisition of such poisons or explosives, then the employee can be found to have violated the regulations concerning the sale of poisons and explosives. Accordingly, the legal person employing the aforementioned employee could also be prosecuted and punished under the provisions for the punishment of a legal person provided for in such regulations; e.g., Law on Prohibition of Chemical Weapons and Regulations of Specific Chemicals, Art. 46, Law on Control of Explosives, Art. 62, etc. In these cases, however, the criminal is not punished for incitement to murder.

As noted above, there are no provisions for the punishment of legal persons with respect to kidnapping or human trafficking, while there are provisions for the punishment of overseas criminals (PC, Art. 224, 227). However, a person who has had a foreign national engage in illegal work or who has placed a foreign national under his/her control for the purpose of having the foreign national engage in illegal work is to be punished with imprisonment of not more than 3 years, a fine of not more than 3 million yen, or both (Immigration Control and Refugee Recognition Act (ICRRA), Art. 73-2). With regard to these offenses, there are legal provisions to punish a legal person. (ICRRA, Art. 76-2). In Japan, as ICRRA does not provide legal status for unskilled workers, the activities of the victims of human trafficking are mostly

defined as illegal work. In consequence, the legal person who is involved in human trafficking could be prosecuted and punished under the said provisions.

Forced labor may be punished as confinement under the Penal Code and is prohibited under the Labor Standards Law (LSL), Art. 5 and punishable by imprisonment for more than one year and not more than ten years or a fine of more than two hundred thousand yen and not more than three million yen (LSL, Art. 117). The forced labor of children under fifteen years of age is also prohibited and punishable by imprisonment of not more than one year or a fine of not more than five hundred thousand yen (*Id.* Art. 117). There is also a provision punishing business entities for crimes provided under LSL (*Id.* Art. 121). On the other hand, there is no provision for punishing a Japanese national committing such crimes outside of Japan.

However, for a crime committed outside of Japan, in the case that the incitement or accessory acts are committed domestically, or in the case that the conspiracy is conducted domestically and the conspiracy co-principal theory is applied, such an accomplice may be punished according to the interpretation that the offense is committed inside Japan (See the answer to Question 6). We have not yet observed either such case in practice.

IV. Alternative Mechanisms

12. Can you think of any bases in your country's tort law (civil law) for suing individuals and/or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

In Japan, many cases relevant to Question 12 are found among Postwar Compensation Lawsuits that claim violations against International Humanitarian Law or international criminal law.[38]

For the moment, no Supreme Court judgment has directly clarified whether it is possible to make a civil claim for the violation of IHL or international criminal law against a private individual or a business entity. However, in regard to claims against the Government of Japan, there have been Tokyo High Court judgments indicating that the Convention respecting the Laws and Customs on War on Land (the Hague Convention), Art. 3 does not give an individual the right to claim compensation against the government.[39] In addition, as an example of a lawsuit against a business entity, there were claims filed for damages for a company's alleged functioning as a munitions company (in almost same way as the government) in a war-time economy. The legal basis for the claims included the Hague Convention, crimes against humanity regarding war crimes, and the ILO Convention No. 29. In regard to the

[38] Note that all of these example cases are not connected to criminal lawsuits, as in Japan, "action civil proceeding" were abolished after World War II.

[39] Tokyo High Court, Judgment of Mar. 27, 2002, 1802 HANREI JIHOU, 76. It dismissed the compensation claims against Japan for the damages sought for the pain and suffering caused by the alleged forced labor and abusive treatment by Japan. The claims were brought by British former prisoners of war confined in prisons by Japan during WW□. The final appeal was dismissed, and the decision became binding. Similar claims by Dutch former prisoners of war were dismissed by Tokyo H. Ct., J. of 2001, Oct. 11, 48-9 Shomu Geppo [SHOMU GEPPO] 2123. The final appeal against the decision was dismissed, and this decision also became binding.

plaintiffs, the Hiroshima High Court denied that these international laws provided the grounds for the specific rights of individuals to compensation.[40]

Among Postwar Compensation Lawsuits, including lower court judgments, we see no cases, at the present time, in which claims of civil law against private business entities on the grounds of IHL or international criminal law were sustained.[41] However, there have been some judgments that sustained claims against private business entities on another legal basis, negating the need to rely on international law.[42]

These judgments, however, did not necessarily reject completely civil law compensation claims against a private individual or a business entity for activities in violation of international law. Japanese law requires both "intent or negligence" and "illegality" (or "infringement of rights") for the establishment of a tort (Civil Code, Art. 709; also Art. 710 provides for joint torts and Art. 715 provides for employer liability"; hereinafter, torts on all these statutory bases have been included).[43] It can be considered that, when there is a violation of international law, the required element of "illegality" may be satisfied, consequently enabling tort-related claims to be made.[44]

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[40] Hiroshima High Court, Judgment of Jan. 19, 2005, 51-12 SHOMU GEPPO, 1 (The plaintiffs are nationals of the Republic of Korea who were allegedly taken against their will by force by Japan from the Korean Peninsula to Hiroshima during WW□ and forced to work at Mitsubishi Heavy Industry, later becoming victims of the atomic bombing by the United States on August 6, 1945. They claimed compensation for damages for pain and suffering from the Government of Japan and Mitsubishi, as well as the payment of unpaid salaries from Mitsubishi. Petition to the court for acceptance of appeal to the Supreme Court has been made and is pending.)

[41] Osaka H. Ct., J. of Nov. 19, 2002, 50-3 SHOMU GEPPO 815 (appeal pending), Nagoya High Court, Kanazawa division, Judgment of Dec. 21, 1998, 1046 HANREI TAIMUZU 161 (settled after appeal), Nagoya District Court, Judgment of Feb. 24, 2005, 1894 HANREI JIHOU 44 (appeal pending), Hiroshima District Court, Judgment of Jul. 9, 2002, 1110 HANREI TAIMUZU 253. (Please see, however, its appellate decision, Hiroshima H. Ct., Judgment of Jul. 9, 2004, *infra* note 42), Tokyo District Court, Judgment of May 26, 1997, 1614 HANREI JIHOU 41 (settled after appeal). These claims were made on the alleged facts of forced migration and forced labor and on the legal grounds of the Hague Convention, "crimes against humanity" as customary international law, ILO Convention No. 29, abolition of slavery as customary international law, and omission in remedial measures after ratification of ICCPR. Each of these claims was dismissed for the following reasons: lacking a legal basis for an individual's right to compensation, (the) treaties not applying to actions between private parties, business entities not being able to be equated to nations, prescription (statute of limitation), time of exclusion (expiration period), "Agreement on the Settlement of Problems concerning Property and Claims and the Economic Cooperation between Japan and the Republic of Korea," and no retroactivity of the effects of the treaty.

[42] Hiroshima H. Ct., J. of Jul. 9, 2004, 1865 HANREI JIHOU 62. (Affirming the original decision that dismissed claims on the basis of international law, the court allowed a certain amount of compensation, holding that the defendant, Nishimatsu Kensetsu Corporation, violated the *Anzen Hairyo Gimu* (Obligation of Security) under Japanese law vis-à-vis the employees (the plaintiffs), and there were factual circumstances that invoking extinctive prescription (statute of limitation) in this regard was an abuse of rights and not to be allowed.); Niigata District Court, Judgment of Mar. 26, 2004, 50-12 SHOMU GEPPO 3444. (While tort-related claims were denied according to time of exclusion (expiration period), a certain amount of compensation was allowed with the holding that there was a violation of *Anzen Hairyo Gimu* (Obligation of Security) by then Niigata Koun Corporation vis-à-vis the employees (the plaintiffs), and invoking prescription by the Corporation was a serious deviation from socially acceptable practices.) With respect to *Anzen Hairyo Gimu* (Obligation of Security), see *infra* the answer to Question 15.

[43] Examples include Supreme Court, Judgment of Feb.27, 1962, 16 Minji hanreishu [MINSHU] 407, Sup. Ct., J. of Feb.25, 1993, 47-2 MINSHU 643.

[44] Laws of a foreign country may be applied as the laws of the place of tort. *Horei* (Act on the Application of Laws), Art. 11, Para. 1. Even in such a case, Japanese law is applied cumulatively in relation to the formation and the effect of a tort. *Horei*, Art. 11, Para. 2. The General Principle Act on

In fact, there was a court decision in which the Fukuoka High Court sustained the formation of a joint tort committed by the Government of Japan and Mitsui Mining Industry, with the finding of the violation of ILO Convention No. 29, Art. 2, Para. 1, which prohibited forced labor (but, consequently, the claim was dismissed for the reason that the twenty-year statute of limitation had passed as provided in the Civil Code, Art. 724, the latter sentence).[45]

Among the Hiroshima H. Ct. judgment described above and judgments in footnote no. 41, there have been decisions that deny the compensation claims by an individual victim for the reason that "crimes against humanity" were established for the purpose of clarifying the criminal liability of an individual who committed a war crime and of punishing him/her. These decisions, however, did not go further than to deny the existence of an individual's right to compensation directly based on international criminal law only. They were not intended to deny that a violation of international criminal law or IHL could satisfy the "illegality" requirement for a tort-related claim in a civil action.[46]

Therefore, if an individual or a business entity violates IHL or international criminal law in the future, there may be sufficient room for a tort-related claim to be sustained on the grounds that the said violation satisfies the requirement of "illegality," considering that the normative positions of these laws have become more specific and firm with the evolution of international law since WW Ⅱ (when the events, with which the judgments cited above dealt, took place), and that obstacles, such as prescription or time of exclusion, can be avoided by making a timely claim.

13. On what basis do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Answer to Questions 13 (criminal):
Under Japanese law, in principle, venue (jurisdiction of each court) for a criminal case is found in the following places. Code of Criminal Procedure, Art. 2.

i. Location of the crime. *Id.*, Para. 1.

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the Application of Laws (GPAAL) was enacted in June 2006 by revising *Horei*, and Article 22 of the GPAAL is basically the same provision with Art. 11, Para. 2 of *Horei.* (Note that GPAAL is to take effect by June 20, 2007.) See also *infra* the answer to Question 16.

[45] Fukuoka H. Ct., J. of May 24, 2004, 50-12 SHOMU GEPPO 3646. Note that in connection with the Tokyo D. Ct., J. of Dec. 10, 1997, 988 HANREI TAIMUZU 250 (settled after appeal), the plaintiffs of the said case explicitly argued that treaties such as the Hague Convention, Art. 4, 6, and 7, Geneva Convention (Convention relative to the Treatment of Prisoners of War (1929)), Art. 2, Art. 11, Para.1, and Art. 29, etc., Slavery Convention, and ILO Convention No. 29, establish public order or *Jori* (see *infra* note 51) in domestic law as an internationally recognized norm, and though an individual is not an addressee of the aforementioned treaties, a violation of these treaties satisfies the requirement of illegality or infringement of right. However, the court neither affirmed nor denied this point and simply rejected the tort-related claim according to Cicil Code, Art. 724, the latter sentence, on the basis of time of exclusion (expiration period).

[46] Under Japanese law, a violation of criminal law generally can satisfy the "illegality" requirement of a tort-related claim in a civil lawsuit. See Osaka H. Ct, J. of Sept.29, 2000, 1055 HANREI TAIMUZU 181, and Osaka H. Ct, J. of Oct.3, 2000, 1756 HANREI JIHOU 88.

ii. Domicile, residence, or current location of the defendant. *Id*.[47]
iii. For a crime committed on board a ship outside of Japan: Location of the place where the ship was registered, first anchorage site of the ship after the crime was committed (if the crime was committed while at sea), as well as (i) and (ii) above. *Id*., Para. 2.
iv. For a crime committed in an airplane outside of Japan: Location where the airplane landed (if the crime was committed during flight), as well as (i) and (ii) above. *Id.,* Para. 3.

In addition, for related cases, a court which has jurisdiction over one of the cases may exercise its jurisdiction over any of the other case(s) through (compulsory) joinder (*Id*. Art. 6). Related cases, in this regard, may be determined as follows (*Id*. Art. 9).

i. One person committed more than one crime.
ii. More than one person jointly committed the same crime or different crimes.[48]
iii. More than one person in collusion separately committed each crime.
iv. In connection with (and in addition to) the original crime, such crimes as the concealment of criminals, destruction of evidence, perjury, false expert examination/testimony, false interpretation, and crimes concerning stolen property. Please note that under Japanese law, the location of the stolen property cannot be the sole grounds for determining personal jurisdiction for criminal cases.

It is considered that a legal person is to be treated in the same manner as an individual (natural) person, since the Code of Criminal Procedure does not have any specific provision clarifying the determination of jurisdiction for legal persons. The domicile of a legal person is provided as being the location of the principal office (Civil Code, Art. 50). While the location of the principal office is to be identified in reference to the law that provides the grounds of incorporation of each legal person, the principal office is usually that office originally registered in the legal person's articles of incorporation. The issue of how to treat a legal person incorporated under a foreign law is determined by applying the corresponding Japanese law which regulates the same kinds of legal persons In Japan.

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[47] "Current location of the defendant" here means a place where the defendant is located voluntarily or legally forced to be located at the time of prosecution. (Sup.Ct, D, Apr. 30, 1957, 11-4 KEISHU 1502, Sup. Ct, J, May 24, 1958, 12-8 KEISHU 1535) Accordingly, if a person is legally arrested or detained at a certain place and transferred to another place, the venue is found in the latter place (the location after the transfer) as "the current location of the defendant."

[48] With respect to the issue of whether an actor and the business owner in a criminal offense with *Ryobatsu Kitei* (Double Punishment Provisions) fall under the provision "[m]ore than one person jointly committed the same crime or different crimes," there is a decision of the Supreme Court that could be seen as recognizing such an application in *obiter dictum*. (Supreme Court, Decision of December 17, 1968, 22-13 KEISHU 1476. Where only a legal person is prosecuted, summary courts have jurisdiction over such cases (Court Organization Law, Art. 33) unless there is a specific provision in a special law, as, generally, only fines are provided as the penalty for legal persons. However, regarding the case in which a business owner was a defendant for a criminal offense with *Ryobatsu Kitei*, in the decision, it was mentioned that "jurisdiction for related cases arises according to the Code of Criminal Procedure, Art. 9, Para.1, No. 2, and Art. 3, Para.1, when the actors are being prosecuted together." This decision thus provided support for jurisdiction by joinder in district courts for such cases. To the same effect, see Takehiko Kojima, *Ryobatsu Kitei niokeru Houjin Shobatsu to Jugyouin Shobatsu no Kankei* [Relationship between Punishment for Legal Persons and Punishment for Employees and the like in Ryobatsu Kitei] 23-1, 2 Keihou Zasshi.

Please note that Art. 27 of the Code of Criminal Procedure provides that the representative(s) of a legal person conduct the procedural acts of the legal person.

Whether the aforementioned process is to be applied in all respects in deciding the issue of personal jurisdiction for international cases (for instance, whether jurisdiction by joinder on the grounds of the Code of Criminal Procedure, Art. 6, is to be applied in the same manner for international cases as domestic cases) is not necessarily clear, since we see no actual examples.[49] Nevertheless, it seems clear, from the languages of relevant provisions, that Japanese courts can exercise personal jurisdiction, for a crime committed outside of Japan, at least over a person located in the place where the ship is registered, in its first anchorage site, or in the location where the airplane landed, if such a place is in Japan (Code of Criminal Procedure, Art. 2, Para.2 and Para. 3). Also, it would be interpreted that jurisdiction based on domicile, residence, or current location of the defendant in Japan would be recognized even for crimes abroad (Code of Criminal Procedure, Art. 2, Para. 1; Of course, this is limited to the crimes for which subject matter jurisdiction can be recognized and to which Japanese law can be applied.) For example, when the defendant happened to stay in Japan, or entered to Japan in response to a request of voluntary appearance by the investigation authority, Japan as the place where the defendant is located comes to have jurisdiction, and accordingly he/she can be arrested and/or prosecuted in Japan.

V. Jurisdiction and related issues

13. (civil) On what basis do the courts of your country assert personal jurisdiction over criminal and civil defendants?

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

Answer to Questions 13 (civil) and 18:

To understand the issue of international adjudicative jurisdiction of Japan, we first discuss the issue of (personal) jurisdiction of each court of Japan, or "venue," for domestic cases and then discuss the issue of international jurisdiction below.

1. Domestic Cases

(1) Under the Code of Civil Procedure of Japan, the issue of “venue” (i.e., before which court a lawsuit should be brought) is decided on the following grounds. (Please note that only items that may be relevant to this project are listed here.)

[49] Beyond the issue of criminal court jurisdiction, scholars are also divided on the issue of whether the application of the Code of Criminal Procedure in general is limited to a domestic sphere. However, it seems that the Supreme Court takes the view that it is not limited to a domestic sphere. *See* The Court Training Institute, *Shogai Keiji Jiken ni okeru Shokikan Jimu no Kenkyu* [Study on Court Clerk Affairs in International Criminal Cases] at 226.

a) General venue for a defendant (Code of Civil Procedure, Art. 4) (to be explained later in detail)
b) Suits with respect to property rights: the location of performance to be done (*Id.* Art. 5, No. 1)
c) Suits with respect to property rights against seaman: the location of the registration of the ship (*Id.* No. 3)
d) Suits with respect to property rights filed against a person who does not have domicile in Japan (in the case of a legal person, the location of an office or a business site) or whose domicile is not known: location of the object of a claim or an asset of the defendant. (*Id.* No. 4)
e) Suits involving business at an office or a business site: location of the office or the business site. (*Id.* No. 5)
f) Suits with respect to a ship or voyage filed against the ship owner or a person utilizing the ship: location of the registration of the ship (*Id.* No. 6)
g) Suits related to torts: location where the tort occurred (*Id*. No. 9)
h) Suits for damages resulting from a maritime accident such as a collision of ships: location first reached by the suffering ship. (*Id.* No. 10)
i) Suits with respect to marine salvage: location where the marine salvage was conducted or location first reached by the salvaged ship. (*Id.* no. 10)
j) Agreement in writing (Code of Civil Procedure, Art. 11) or response to a suit. (*Id*. Art. 12)
k) Claims between parties: the venue for one of these claims. (*Id.* Art. 7)
l) The rights or obligations as the objects of suits common to more than one person or such rights or obligations based on the same factual and legal grounds: the venue for one of these suits ("joinder of suits" by more than one plaintiff or against more than one defendant) (*Id*. Art. 38, the former part.)

(2) General venue for a defendant is decided as follows (*Id.* Art. 4):

Individual:

- Domicile.
- Residence, if the person has no domicile in Japan or the person's domicile is unknown.
- Last domicile, if the person has no residence in Japan or the person's residence is unknown.

Legal person or other type of association or foundation:

- Principal office or business site.
- Domicile of a representative or a manager or controller in charge of the business, if there is no office or business site.

Foreign association or foundation:

- Principal office or business site in Japan, notwithstanding the above provisions.
- Domicile of the representative in Japan or a manager or controller in charge of the business, if there is no office or business site in Japan.

2. International Adjudicative Jurisdiction

(1) In regard to the issue of personal jurisdiction in lawsuits with international character (hereinafter "international adjudicative jurisdiction" or "international jurisdiction"), the Supreme Court judgments set the following legal precedents.[50]

The issue of in what kind of cases the international adjudicative jurisdiction of Japan should be recognize is decided with reference to *"Jori"*[51] based on fairness between parties and on the principle of just and speedy trial. Where any venue (each court's jurisdiction) provided in the Code of Civil Procedure of Japan is found within Japan, it is appropriate, in principle, to subject the defendant to the jurisdiction of Japan with respect to a lawsuit which was brought before a court of Japan. However, where it is found that there are special circumstances and that holding the court proceeding in Japan would be contrary to the fairness between the parties and the principle of just and speedy trial, the international adjudicative jurisdiction of Japan should be declined.

In other words, (i) the jurisdiction of the Japanese courts is confirmed, in principle, even for a lawsuit with international character, where a venue (each court's jurisdiction) is found as described in the paragraph "1. Domestic Cases" above. However, as the exception to this principle, if there exist special circumstances such that "it would be against the fairness between the parties and the principle of just and speedy trial," the jurisdiction of the Japanese courts is denied. (Please note that the case of joinder is slightly different and described later in this paper.)

Analytically, it can be said that the latter "special circumstances" theory, sometimes performs a function similar, though not the same, to the doctrine of forum non conveniens. Therefore, "Yes" is the answer to Question 18 "Do the courts of your country sometimes decline to exercise jurisdiction, … thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?"[52] (Please note that while the

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[50] Supreme Court, Judgment of November 11, 1997, 51-10 MINSHU 4055 (It is the case in which a Japanese corporation which imported automobiles and other items from Germany brought an action against a Japanese living in Germany to seek fulfillment of the monetary obligation in a contract. The Supreme Court denied the international jurisdiction of Japan over the case due to various circumstances.) In addition, as another precedent, Supreme Court, Judgment of October 16, 1981, 35-7 MINSHU 124 (With respect to the accident of an airplane that crashed in Malaysia, Japanese bereaved families of victims filed a lawsuit in Japan against the airline company which was incorporated under the Corporate Law of Federation of Malaysia. The Supreme Court affirmed the existence of international adjudicative jurisdiction on the grounds that the airline appointed its representative in Japan and had a business site in Tokyo.)

[51] Rule for the Conduct of Court Business (*Saiban Jimu Kokoroe*) (*Dajokan Fukoku* No.103, 1875) states that "For civil cases, when there is no statute, the judge should depend on custom. When there is no custom, he should depend on *Jori*," although whether that Rule is still effective is unclear and a disputed issue. *Jori* means principle of the thing, rule of reason, or fundamental principle of justice and fairness. It may be considered similar to the general principles underlying law.

[52] Tokyo High Court, Judgment of December, 25, 1996, 49-3 KOSAI HANREISHU 109. The Court held that it cannot be said that there are "special circumstances" in consideration of the following: (i) none of the Hong Kong corporations (defendants) conducted business in Japan; (ii) as the claims themselves were not related to Japan, the burden of response to the lawsuit in Japan would be considerably large; (iii) it was not necessarily found that a unified dispute settlement should be expected with respect to the relationship between the claim against the Japanese corporation defendant and the claims against the Hong Kong defendant corporations; (iv) the relation between Japan and the

Supreme Court judgment above denied the international jurisdiction of the Japanese courts for a case, in so deciding, the Court did not require the defendant to consent to the jurisdiction of a foreign court.)

(2) On the other hand, it cannot be said that the framework described in (1) above also applies to international jurisdiction on the grounds of the venue resulting from the joinder of suits by more than one plaintiff or against more than one defendant (Code of Civil Procedure, Art. 7, the former part of Art. 38). In this regard, while we do not see any Supreme Court precedents, a judgment of the Tokyo High Court for a case involving the joinder of defendants, as quoted below, required that "special circumstances" be met, not as the exception or negative elements, but as the positive elements necessary for international jurisdiction to be confirmed. (Please note that in denying the international jurisdiction of the Japanese courts for the case, the Court did not require the defendant to consent to the jurisdiction of a foreign court.)

> With respect to an international civil lawsuit involving a subjective joinder of suits, where the venue for the case is Japan only because of the provision of the joinder of suits under the Code of Civil Procedure, Art. 21 (Note by quoter: currently Art. 7 of the Code of Civil Procedure), the above stated *Jori* indicates that the international jurisdiction of a Japanese court is confirmed only where there exist special circumstances indicating that holding court proceedings in a Japanese court would fit in with the fairness between the parties and the principle of just and speedy trial in light of the specific factual situations of the case.

It should be noted, however, that a judgment of the Tokyo District Court preceding the judgment of the Tokyo High Court above confirmed the international jurisdiction over the defendants including a Hong Kong corporation, with respect to a case in which the joint defenders were a Japanese corporation, the Hong Kong corporation, and former employees of the Hong Kong corporation (who were employees of the Japanese corporation at the time of the suit). The court so decided by applying mutatis mutandis Art. 21 of the former Code of Civil Procedure (current Code of Civil Procedure, Art. 7) on the grounds that there was a close relationship among the defendants as the Hong Kong corporation was a 100% subsidiary of the Japanese corporation defendant.[53]

Also, with respect to a case involving the joinder of plaintiffs, apparently a ruling of the Nagoya District Court required that the joinder of plaintiffs fit in with the fairness among the parties and the principle of just and speedy trial, while the court did not use the wording "special circumstances."[54]

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evidence regarding the validity of the claims against Hong Kong defendant corporations was quite remote. Accordingly, the court denied the international jurisdiction of the Japanese courts for the case.

[53] Tokyo District Court, Judgment of June 28, 1989, 1345 HANREI JIHOU, 93; see also Tokyo District Court, Judgment of June 1, 1987, 1261 HANREI JIHOU 105. Additionally, the Tokyo District Court, Judgment of February 5, 1997, 936 HANREI TAIMUZU 242 denied the international jurisdiction over a parent company for a case in which the parent company was an American corporation and the subsidiary was a Japanese corporation. It held that, on the premise that the proof was insufficient for establishing the tort liability of the parent company, there were not sufficient special circumstances to connect the subjective joinder with the subsidiary company.

[54] Nagoya District Court, Judgment of December 26, 2003, 1854 HANREI JIHOU 63 (With respect to an accident of an airplane that crashed in Japan, Japanese bereaved families, Taiwanese bereaved

> It is appropriate to interpret the above stated *Jori* as indicating that where a venue of the joinder of suits is found in Japan as provided by the former Code of Civil Procedure, Art. 21 (Code of Civil Procedure, Art. 7), the international jurisdiction of a Japanese court is confirmed as well if doing so would fit in with the above stated principles of fairness between parties and of just and speedy trial.

That being said, as the judgment of the Nagoya District Court confirmed the international jurisdiction of a Japanese court in conclusion, it is possible to see that international jurisdiction on the grounds of the joinder of plaintiffs is relatively easy to be confirmed as the defendant cannot avoid responding vis-à-vis other plaintiffs in the court, as compared to the case of the joinder of defendants.

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

1. The issue of when a Japanese court may assert personal jurisdiction over a private individual or legal person located abroad is as already discussed in our answer to Question 13.

2. The issue here is whether a legal person located abroad may be subject to the jurisdiction (personal jurisdiction) of a Japanese court on the grounds that a Japanese court has personal jurisdiction over another separate legal entity. Generally speaking, even if the separate legal entity is an affiliated company, it is rather difficult for such jurisdictional grounds (for instance, a jurisdictional assertion over an overseas subsidiary company based on the activities of the Japanese parent company or over an overseas parent company based on the activities of its Japanese subsidiary) to be recognized under Japanese law, while there may be such cases as listed below:

— When the jurisdiction based on joinder is confirmed; i.e., such as when claims against both business entities are based on the same factual and

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families and others filed the case against the airline company as a Taiwanese corporation. Nagoya District Court interpreted that action with respect to Taiwanese bereaved families, while Taiwan was explicitly indicated as having jurisdiction according to the Warsaw Convention, the issue of international jurisdiction on the grounds of joinder was left to the general theory of international adjudicative jurisdiction. Then it held that there were circumstances in which holding the court proceedings in Japan would fit in with the fairness between the parties and the principle of just and speedy trial by considering the following factors: (i) the degree of the burden and predictability for the defendant for the lawsuit in Japan; (ii) the defendant had no other choice but to respond to the claims of other plaintiffs in Japan irrespective of the joinder; (iii) special factors such as the difficulty of proving the cause of the accident and the benefit of mitigation of the burden of the Taiwanese bereaved families in pleading and preparing evidence by their becoming the joint plaintiffs; (iv) the possibility that the Taiwanese plaintiffs might be forced to file a separate case in a country other than Japan where the case had been filed against the joint defendant airplane manufacturer ; (v) a concentration of important evidence was found in Japan; (vi) as there was no Judicial Assistance arrangement between Japan and Taiwan, there was a possibility that such evidence and the like might not be available for trials in Taiwan; and (vii) promotion of streamlined and speedy proceedings and trials on the issue of the liability of the airplane company was a common point of the dispute.)

legal grounds (Please see Section 2, Paragraph (2) of the answer to Question 13 (civil) and 18);

— When a claim itself may be asserted directly against a defendant who is subject to the personal jurisdiction of Japanese courts based on "pierce the corporate veil," etc. (Please see the answer to Question 15).

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. "pierce the corporate veil"?

We discuss civil cases in paragraphs 1 -3 and briefly touch on criminal cases in paragraph 4.

1. Doctrine to Disregard Corporate Fiction ("Pierce the Corporate Veil")
The Supreme Court judgments established the precedents for corporate fictions to be denied in two types of cases: (a) a corporate fiction is a mere façade (the "façade type"); and (b) a corporate fiction is abused to evade the application of law (the "abuse type").[55]

Of the two types, with respect to the latter, (b) the "abuse type," it is often said that "control" and "purpose" must exist.[56]

In addition, with respect to (a) the "façade type," as an example of a recent case, the court held that a parent company in a security business was not allowed to evade the contractual liability of a subsidiary company, which was established as a mere façade, as the parent company had had the aforementioned dummy subsidiary incorporated abroad for illegal purpose.[57]

2. Labor-related Legal Theories
Apart from the cases stated in paragraph 1 above, there are cases where employees of a subsidiary and the like may claim that they have contractual or other types of legal relationships directly with the parent company. It goes without saying that included in such cases are cases in which a substantial employment relationship is claimed to exist between an employee and the parent company.

Under Japanese law, as a remedy for unfair labor practice, a labor union may petition a labor relations commission, apart from filing a court case. The definition of "employer" in the context of unfair labor practice is interpreted to include one in a

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[55] Supreme Court , Judgment of February 27, 1969, 23-2 MINSHU 511; Supreme Court, Judgment of October 26, 1973, 27-9 MINSHU 1240. See also Supreme Court, Judgment of September 26, 1974, 28-6 MINSHU 1306, which stated that care must be taken in the application of the doctrine.

[56] For instance, Osaka High Court, Judgment of January 30, 2003, 845 RODO HANREI 5 (The court held that the requirement of control was not met regarding the control of the assigner over the contractor); as one of the examples of affirmative cases, see Osaka High Court, Judgment March 30, 1984, 1122 HANREI JIHOU 164 (The court held that in dissolving the subsidiary company, the parent company unduly exercised the power of control for the purpose of unfair labor practice, and so thereby abused the fact that the subsidiary company was a separate legal entity. Also see Osaka High Court, Judgment of June 26, 2003, 858 RODO HANREI 69, as a case in which the requirement of purpose was ruled to have been unmet, while the requirement of control was ruled to have been met.

[57] Tokyo High Court, Judgment of January 30, 2002, 1797 HANREI JIHOU 27. It is noted that the factor of abuse were also found in the case.

position, if not as direct contractual employer, able to control and decide basic labor standards and the like actually and concretely, even in part, thereby being equated with the contractual employer.[58] Accordingly, a parent company, for instance, can fall under the category of "employer" vis-à-vis employees of the subsidiary company.

In addition, as an important issue accompanying labor relationships, there are precedents regarding "*Anzen Hairyo Gimu*," the obligation of an employer (and others) to consider the security of the employees (and others) (hereinafter "Obligation of Security"). In a case in which the former employees of contractor companies, who had engaged in work in the dusty environment of coal mines and had fallen ill with pneumoconiosis, sought damages against the business entities responsible for managing the coal mine, the Fukuoka High Court held that "the Obligation of Security is an obligation between the parties who have entered into a special relationship of social contact based on a certain legal relationship, such that one party is, or both parties are, based on the fair and equitable principle, obliged to have such duty towards the counter party as an accompanying duty of the said legal relationship, and that such duty does not necessarily require the employee to have a contract directly with the employer."[59]

3. Employer Liability

Art. 715 of the Civil Code provides that "one who employs another person for a business is liable for the compensation for damage to a third party inflicted by an employee[60] in the execution of the business."[61]

Here, the issue of whether the "employment" relationship exists has been held "to be decided in light of whether there is a substantive relationship of direction and supervision between an employer and an employee regarding the business in question."[62] It is interpreted as meaning that it does not matter whether the relationship between an employer and employee is based on a valid contract or has emerged de facto or whether the relationship emerged directly or indirectly.[63]

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[58] Supreme Court, Judgment of February 28, 1995, 49-2 MINSHU 559.

[59] Fukuoka High Court, Judgment of July 19, 51-4 SHOMU GEPPO 821. The court, on that basis, held that the defendants were obliged to have, based on the fair and equitable principle, the Obligation of Security vis-à-vis the plaintiffs, who were employees of contractors, because the defendants of the coal mine management companies possessed the mining rights and basic facilities, decided and implemented the basic mine planning and the like, the plaintiffs worked in tunnels of coal mines managed by the defendants, and the definition of "mine worker," which was covered under "the duty of measures for harm prevention" of a mining rights holder under the Mine Safety Law, included a worker of a contractor company. Furthermore, the court found the breach of the Obligation of Security as outsourcers by stating that the defendants did not take measures for pneumoconiosis prevention based on the highest engineering technology standards practically available in each era. While the defendants appealed some issues, the Supreme Court dismissed the appeals making the decision final and binding.

[60] There are court decisions holding that the name of an employee is not required to be identified in pursuing the liability of an employer. (e.g.) Fukuoka District Court, Judgment of March 24, 1976, 351 HANREI TAIMUZU 323.

[61] Additionally, in the case of a representative (not an employee) of a company, article 350 of the Corporate Code provides, for example, that "a business corporation is liable for the compensation for the damage inflicted on a third party by a representative director or other representative in the execution of his/her duty.

[62] Tokyo High Court, Judgment of November 20, 1997, 1673 HANREI JIHOU 89.

[63] Chiba District Court, Judgment of September 30, 1997, 1659 HANREI JIHOU 77.

Therefore, for instance, where "the substantive relationship of direction and supervision" exists between an employee of a subsidiary company and the parent company, the parent company is liable when the employee of the subsidiary causes tort-related damage to a third party. In this connection, there is a case in which there were multiple subcontracts, and the the original contractor was found liable for the tort committed by the bottom layer subcontractor, as it was determined that the original contractor had a relationship of “direction” and “supervision” over the bottom layer subcontractor.[64]

4. "Ryobatsu Kitei" and Affiliated Companies

In footnote 6 in the answer to Question 5, we have touched on the issue that "a worker of other types" appearing in a typical *Ryobatsu Kitei* is not limited to a person whom the business owner contractually employs by itself. In regard to the definition of an “employee,” the Tokyo High Court held that if “the worker is within the organization of the legal person for the business and directly or indirectly engaged in its business activities, irrespective of the worker’s job title, it is not required that the aforementioned legal person has caused the worker to become engaged in the business by an employment contract or another type of contract.”[65] According to the decision, it would appear that even for an act of an employee of a subsidiary company, for instance, if he/she is directly or indirectly engaged in the parent company's business activities within the organization of the parent company, the parent company's criminal responsibility could be pursued via a *Ryobatsu Kitei*.[66]

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

Answer to Question 16 (Criminal Cases):

Genocides, crimes against humanity, war crimes, and torture were already discussed in our response to Question 11. We will focus on other crimes here.

1. Bribery

Japan signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997, which entered into effect in February 1999. In addition, Japan also signed the United Nations Convention against Corruption in December 2003, but it has not yet come into effect.

Regarding the bribery of foreign public officials and international public officials, the Unfair Competition Prevention Act, Art. 18, Para. 1 and Art. 21, Para. 1, Sec. 1 provides that a person who has bribed a foreign public official, etc. in order to obtain illicit gains in business with regard to international commercial transactions shall be punished by imprisonment with work for not more than five years, a fine of not more

[64] Akita District Court Ohdate Branch, Judgment of December 10, 1974, 792 HANREI JIHOU 79.
[65] Tokyo High Court, Judgment of January 27, 1982, 37-2 KEISHU 115. The case involved a substantive manager. (The decision became final and binding due to the dismissal of the appeal. Supreme Court, Decision of March 11, 1983, 37-2 KEISHU 54.)
[66] Kojima, *supra* note 48; see also Nagoya District Court, Judgment of March 30, 1995, 51-6 KEISHU 503 (to be final and binding by Supreme Court, Decision of July 9, 1997, 51-6 KEISHU 453).

than five million yen, or both. With regard to this crime, a Japanese national committing it outside of Japan can be punished (*Id*. Art. 21, Para. 6). In addition, a legal person can also be punished, and the fine imposed on a legal person may be increased to not more than three hundred million yen (*Id.* Art. 22, Para. 1).[67]

However, while a person who bribed a Japanese public official is to be charged with bribery under the Penal Code, Art. 198., there is no provision punishing a legal person or a Japanese national who committed bribery outside of Japan.

2. Money Laundering (and import of properties acquired overseas illegally)

In 1991, the Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conduct and Other Activities Involving Controlled Substances Through International Cooperation was enacted. Under this Law, money laundering of the profits obtained through drug-related crimes is prohibited, and a Japanese national is to be punished in the case that he/she commits such crimes outside Japan (*Id.* Art. 6, 7 and 10). In addition, there is a provision for punishing a legal person (*Id*. Art. 15).

Then, in 2001, the Law for the Punishing of Organized Crimes, Control of Crime Proceeds and Other Matters was enacted, which expanded the range of crimes recognized as the basis of money laundering ("original crimes" hereinafter). Under this Law, the original crimes include theft, robbery, fraud, extortion, and embezzlement committed in the engagement of business (*Id.* Art. 2, Para. 2, No. 1). Under this Law, the aforementioned original crimes committed overseas are also recognized as being original crimes. In addition, there are provisions criminalizing money laundering with regard to the control of the management of enterprises of legal persons through illicit proceeds (*Id*. Art. 9), concealment of crime proceeds (*Id.* Art. 10), and receipt of crime proceeds (*Id*. Art. 11). A Japanese national is to be punished even when he/ she commits such crimes overseas (*Id*. Art. 12). A legal person is also to be punished (*Id.* Art. 17).[68]

Consequently, a person who conceals property illicitly obtained outside of Japan or knowingly receives such property is to be punished for money laundering, regardless of whether concealment or receipt the property takes place inside or outside of Japan (*Id*. Art. 10, 11). Therefore, for instance, a Japanese person or a Japanese legal person who knowingly imports to Japan the property stolen by an armed group (or by anyone else) is to be punished under this law.[69]

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[67] It is reported that although there was suspicion of a case of bribery of a foreign public officer that was investigated by the Japanese procuratorial authority, such cases have never been prosecuted. May 22, 2006, *Yomiuri Shimbun* [Yomiuri Newspaper], morning edition.

[68] For instance, there is a case where a person, who purchased the new shares, which had been allocated to third parties by the Taisho Life Security K.K., with the money acquired from the company by fraud, was punished under Art. 9 of the law (Tokyo District Court, Judgment of Jan. 20, 2003, 1119 HANREI TAIMUZU 267). Another case is that the Goryoukai, an affiliate of a crime syndicate Yamaguchigumi, concealed the proceeds, which were obtained through money-lending business at the rate well over the legal rate, in a bank in Switzerland (Tokyo District Court, Judgment of Feb. 9, 2005, 1185 HANREI TAIMUZU 159.). In both cases, however, the original crimes were committed in Japan.

[69] On the other hand, the Penal Code, Art. 256 criminalizes the transporting, retaining, purchasing, and brokering of stolen property (and other properties obtained through a crime against property), most of which are also punishable when committed outside of Japan by a Japanese national (Penal Code, Art. 3) (As understood clearly from the language, "stolen property" here does not include humans in human trafficking.) The Penal Code of Japan does not have provisions that can be invoked against a foreign

3. Counterfeiting of Currency, Securities, and Cards

The counterfeiting and alteration of Japanese currency is to be punished with imprisonment with work for life or imprisonment with work for not less than 3 years and not more than 20 years (PC, Art. 148). The punishment for importing counterfeit or altered money is the same as that for the counterfeiting and alteration of Japanese currency. Any person who has committed any of the above crimes is to be punished under the Criminal Law of Japan, regardless of the criminal's nationality, even if the crime was committed outside of Japan (PC, Art. 2).[70]

The counterfeiting and alternation of securities (such as bills, checks, stocks, bonds) and the illegal production of electromagnetic records (that constitute credit cards, bank cards, and prepaid cards) are also to be punished although the penalties for those crimes are lighter than the penalties for the counterfeiting of currency, and such a criminal, regardless of his/her nationality, is to be punished even if the crime has taken place outside of Japan (PC, Art. 162, Art. 163-2, and Art. 2).

Concerning these crimes discussed in this section 3, there are no provisions that specifically provide for the punishment of a legal person. However, it is prohibited to import currency and securities that are counterfeited, altered, or imitated and cards that consist of illegally written electromagnetic records (Customs Law. Art. 69-8, Para. 1, No. 6). And a person who has imported any of the above in violation of Customs Law is to be punished with imprisonment with work for not more than 5 years, a fine of not more than 30 million yen, or both (Id., Art. 109). Customs Law also includes a provision that specifically provides for the punishment of a legal person (*Id*, Art. 117).

4. Environmental Crimes

Under the Law Concerning Punishment of Environmental Crimes Impacting Human Health, a person who endangered life or health of the public by expelling substances which are harmful to human health is to be punished. Regarding this crime, business entities are also to be punished.

However, there is no provision for punishing a person who committed such crimes outside of Japan. Nevertheless, in the case that the conspiracy, incitement or being an accessory is conducted domestically, such an accomplice may be punished as a crime committed inside Japan (see the answer to Question 6). We have not yet observed such cases in practice.

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national when he/she has committed theft outside of Japan, but stolen property under this category is also interpreted as being subject to the provision herein regarding the crime of receiving stolen property. PC. Art. 256 (Hitoshi Otsuka, *Keihou Kakuron* [Specific Theory of Criminal Law] at 325.) However, since there is no specific provision for punishing the legal person who has committed the said crime, a legal person is not to be punished.

[70] The creation of false currency or securities not so elaborately imitated as to be found counterfeit is also to be punished under "Imitation of Currency and Securities Control Act," though with lighter penalties. Also, there are some provisions for punishing the counterfeiting and alteration of foreign currency and for the importing of such counterfeit or altered foreign currency. PC, Art.149, and others. These provisions, however, do not provide for the punishment of overseas criminals except in limited cases such as the importing of counterfeited/altered foreign currency.

Answer to Question 16 (civil):

As shareholders' representative actions (derivative lawsuits) are not against business entities but are claims against directors, etc. as defendants, we have excluded this type of lawsuit from consideration here. (With respect to the issue of international jurisdiction, please see the response to Question 13.)

1. Contractual Relationship-related Claims

In the case that an underlying contract is made or concluded in Japan,[71] it is no wonder that the contractual liability of a business entity, as a party of the contract, may be pursued in a Japanese court, even if the relevant acts/activities based on the contract take place abroad.[72] In connection with employment contracts, there was a case in which an employee of a Japanese business entity died from overwork (*karoshi*) while on duty at the local affiliated company in Hong Kong, and the family of the deceased sued for damages against the headquarters in Japan and the local affiliated company as defendants in the Akita District Court of Japan on the grounds of breach of the Obligation of Security under the employment contract.[73]

2. Tort-related Claims

With respect to the overseas activities of business entities, one of the major problems to be faced in bringing an action seeking tort-related damages is the issue of "choice of law." The Act on the Application of Laws, Art. 11, is as follows:

1) The formation and effect of claims arising from … tort shall be governed by the law of the place where the events causing the claims occurred.

2) The preceding paragraph shall not apply where the events that comprise the tort occurred abroad and are not considered to be illegal under Japanese law.

3) Even where the events that occurred abroad constitute a tort under Japanese law, the victim may not demand recovery of damages or any other remedy not available under Japanese law.

According to the article, once someone files such a lawsuit in any Japanese court, it must be confirmed that the claim could be made under the law of the place where the events underlying the claim took place (i.e., the underlying events were illegal in that

[71] Where parties do not indicate any governing law, the law of the place of the act (*lex loci actus*) – the law of the place where the parties made and concluded the contract. Japanese law is the one here – shall be applied on the formation and effect of the contract according to the Act on the Application of Laws (*Horei*), Art 7. Para. 2. Note that the General Principle Act on the Application of Laws (GPAAL) was enacted by revising *Horei*. The GPAAL is to be implemented by June 20, 2007. Article 8 of the GPAAL provides, with respect to the formation and effect of a contract, that the law of the place most closely related to the contracting act at the time of the contract is to be applied, where the parties do not indicate any governing law.

[72] For instance, regarding an organized tour agreement, the travel agency's breach of the contractual duty for an accident in Pakistan based on the organized tour agreement was found by the Tokyo District Court, Judgment of December 27, 1988, 1341 HANREI JIHO 37 (however, the court dismissed the claim as it held that there was insufficient evidence to establish a causal relationship between the breach of the duty and the damage.)

[73] While the judgment in the first instance was against the plaintiffs (Akita District Court, Judgment of July 19, 1999, not published in law reports), after the appeal, a settlement was reached, and fifty million yen was paid to the plaintiffs.

place),[74] *and* such underlying events must also be illegal under Japanese law. Furthermore, the claim must remain within the confines recognized under Japanese law.[75]

As a result, assuming that a Japanese entity or the persons involved committed abroad one or more of the following: corruption, bribery, racketeering, money laundering, importation of property illicitly obtained, or destruction of the environment, then each paragraph of Article 11 of the Act on the Application of Laws must be satisfied in order for the tort-related claim(s) to be made, where someone tries to bring an action (apart from a case involving a contractual claim) against a Japanese business entity in a Japanese court.

As stated in response to Question 15, under Japanese law, where persons related to business entities committed illegal acts, claims may be made against not only these individuals but also against the related business entities according to the Civil Code, Art. 715 and the Corporation Act, Art. 350. However, these provisions cannot be the direct grounds for claims concerning activities that take place abroad because Art. 11, Paragraph 1 of the Act on the Application of Laws is applied to such activities abroad.[76]

A currently pending case is the Dam Kotopanjang (Dam Kotapanjang) Litigation.[77] The lawsuit was filed with the Tokyo District Court in September 2002 by Indonesian people against Tokyo Electric Power Services Co., Ltd., one of the defendants.[78] The allegations of the plaintiffs against the company concern a matter related to the

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[74] Upon the implementation of the GPAAL (see note 71), the formation and effect of claims arising from tort is, in principle, to be governed by the law of the place where the result of the damaging act occurred. GPAAL, Art. 17. There are special provisions for product liability cases (the law of the place where, in principle, the product was delivered to the victim. *Id.* Art. 18), and for defamation and tarnishment cases (the law of the place, in principle, of the permanent residence of the victim. *Id.* Art. 19).

[75] There is a court judgment which held that even where the right of a tort-related claim for damages is formed under Manchurian law and Japanese law, the claim cannot be allowed due to the statute of limitation and time lapse of the expiration period under Japanese law. Tokyo District Court, Judgment of July 16, 1998, 1046 HANREI TAIMUZU 270. Note that the GPAAL, Art. 22, Para. 1 and Para. 2 are basically the same provisions as Art. 11, Para. 2 and Para. 3 of the Act on the Application of Laws (*Horei*).

[76] Osaka District Court, Judgment of March 15, 1996, 29-2 KOTSU MINSHU 397 (the driver and his employer were held liable under California law for a case where the driver, who was an employee of a Japanese company, had caused a car accident while on a business trip in California, USA, and had imjured a fellow passenger in the backseat (an employee of a business partner).); Osaka District Court, Judgment of December 6, 1990, 760 HANREI TAIMUZU 246 (The court held that a Japanese corporation was liable for the damage by applying German Civil Code, Art. 31; the damage of which was suffered by a third party in the course of the duty in Germany of a representative of the Japanese company); Tokyo District Court, Judgment of May 20, 2002, HANREI MASTER(The court held, for a case of assault and resulting death in Beijing, China, caused by a staff of the Japan Overseas Cooperation Volunteers (JOCV), that there was no relationship of control and supervision between the staff and JOCV (the defendant), in that specific context under Chinese law as the law of the place of the tort; the claim for the damages by the family of the deceased against the defendant was dismissed.) Note that, as mentioned above (note 74), upon the GPAAL's coming into effect, the law of the place where the result of the damaging act occurred is, in principle, to be applied as provided by the GPAAL, Art. 17.

[77] http://www.kotopan.jp/ (as of the end of May, 2006, only in Japanese)

[78] Japan, Japan International Cooperation Agency (JICA), and Japan Bank for International Cooperation are the other joint defendants.

Official Development Assistance of Japan, the dam project in Riau, the central area of Sumatra, Indonesia, and state that: (i) the company (i.e., the defendant) is a consulting firm and committed illegal acts in the course of conducting the feasibility study, creating the detailed design based on the study, and performing supervision; (ii) as a result, due to the implementation of the plan and torts of involuntary resettlement in violation of international guidelines, suffered were a variety of social and economic damages as well as damages of living conditions accompanying the resettlement, the destruction of the local communities, the destruction of the natural environment, etc. It should be noted that the plaintiffs have, in arguing that the governing law is Japanese law, alleged that a material part of the illegal acts in question were conducted in Japan.

In addition to the aforementioned case, there are slightly atypical cases, such as those concerning aircraft accidents for which Japanese courts determined the liability and the damage by ruling that the governing law was Japanese law based on preceding decisions asserting that the Japanese courts had personal jurisdiction over the airlines.[79]

3. Petition to Labor Relations Commission[80]

In the following case, an approach pioneering the utilization of the Japanese legal system in relation to overseas labor disputes was employed.[81] According to the allegations of the petitioner, Filipino workers employed by Philippine Toyota, a Philippine corporation, formed a labor union (Toyota Motor Philippines Corporation Workers Association (TMPCWA).[82] However, the company did not recognize the union nor did it agree to engage in collective bargaining and finally implemented mass layoffs. Accordingly, the TMPCWA joined the Kanto Region Council of the All Japan Shipbuilding and Machine Workers Union, a labor union under Japanese law. Thereafter, the Council requested collective bargaining with Toyota Motor Corporation and Mitsui & Co., Ltd., major shareholders of Philippine Toyota, but the request was refused, so the Council petitioned the Kanagawa Prefecture Labor Commission.
In the dispute, some contested issues were: (i) whether Trade Union Law can be applied to overseas labor disputes; and (ii) whether Toyota Motor Corporation is considered "an employer," although there are no employment contracts directly with the company.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

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[79] Tokyo District Court, Judgment of September 25, 2000, 1745 HANREI JIHOU 102 (this is the case of a Thai Airways plane crash in Nepal. The court held that with respect to the claim, based on the Warsaw Convention, Art. 17, Act on the Application of Laws cannot be applied, and ruled Japanese law to be the governing law, based on the principle of the thing (*Jori*).); Tokyo District Court, Judgment of July 16, 1997, 1619 HANREI JIHOU 17 (This is the case in which a Korean Air Lines plane was shot down by a Soviet fighter jet in international airspace above high seas after the plane's crossing into Soviet airspace; the court held that the place of the tort was the high seas, the place of the crash, and ruled Japanese law to be the governing law, based on the principle of the thing (*Jori*).

[80] See the paragraph regarding "2. Labor Related Legal Theory" in the response to Question 15.

[81] http://www.geocities.jp/protest_toyota/ (Japanese

[82] http://www.tmpcwa.org/index_html (English)

Since Japanese criminal procedure does not recognize incidental claims by a private individual ("action civil" proceedings), a private person is not a party to the proceedings. The following description is for civil procedure.

1. Language Issues

Court Organization Law, Art. 74 provides that the Japanese language shall be used in the courts. Direct questions and answers in a foreign language are not allowed. Therefore, a court interpreter translates witness examination question by question and answer by answer. Consequently, effective cross-examination is sometimes difficult.

Courts rarely approve simultaneous translation even where a party offers to provide translation equipment at their own expenses when the plaintiffs and/or defendants do not understand Japanese.

A court interpreter is usually appointed by a court, but they are not necessarily competent.

It goes without saying that, apart from the issue of court interpreters stated above, as a massive amount of translations are usually required in the course of preparation for court proceedings and trials, actual costs and expenses for those translations could be huge.

2. Litigation Costs and Court Costs

In Japan, each party bears his/her own attorney's fee in principle. Exception to the principle is a claim for damages in tort. Around 10% of the total damages awarded is to be added by the court for the attorney's fee, as one of the tort damage items.

Where victims of massive human rights violations cannot afford even their own attorney's fee, the Legal Aid system could be available. However, the system does not cover residents in foreign countries, with only a small number of exceptions. Moreover, as the system is based on the principle of reimbursement, actual costs and attorney's fee that Legal Aid could provide are kept low. As a result, it would be absolutely impossible to meet even actual costs and expenses for conducting field investigation abroad.[83]

In Japan, a plaintiff must pay, at the time of filing a lawsuit, a court fee according to the amount of the claim.[84] In this regard, there is a system of grace of payment until a court judgment is delivered on the merits where the plaintiff is of limited financial means (Code of Civil Procedure, Art. 82). Also, if daily allowance and travel expenses of a court interpreter are deferred under the system, a court is to pay those costs for the parties. However, as that requires a court actually to expend public money, a court tends to be rather reluctant to defer the payment of the daily allowance and travel costs of an interpreter.

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[83] For domestic massive human rights violation cases, Japanese attorneys who are concerned with human rights issues have been handling such cases by often times either operating voluntary funds or bearing costs and expenses by themselves.

[84] For example, court fee is \50,000 for the amount of a claim \10,000,000; \170,000 for \50,000,000; \320,000 for \100,000,000.

Where a court has deferred collection of such procedural costs, they are to be borne by the losing party against whom the judgment has become final and binding.

3. Privacy of Parties and Protection of Witness etc.
In the context of massive human rights violations abroad, there could be a situation where such a victim may be treated unfavorably by, for instance, the national army or the police, in his/her country of residence, due to the victim's profile in claiming for damages. Access to the record of trial and making copies may be restricted to the parties to the lawsuit on the ground of confidentiality (Code of Civil Procedure, Art. 91 and 92). However, there is no procedural system in litigation (such as a protective order, etc.) to prohibit, for example, a defendant from disclosing information to the national army or the police.[85] Also, with respect to the testimony of a witness, while there is a system of suspension of public trial (Constitution, Art. 82), there is no system to prohibit the parties from disclosing what a witness testified to third parties.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

Yes. (The answer in more detail is included in the Answer to Question 13)

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

In Japan, criminal prosecution power is vested only in the national public prosecutors ("the concept of monopolization of prosecutions", Code of Criminal Procedure, Art. 247). Public prosecutors are authorized to exercise broad discretion on the decision making of public prosecution or non-prosecution ("principle of discretionary prosecution" *Id*. Art. 248).

While, as a result, the decision of prosecution or non-prosecution is a matter of exclusive discretion for public prosecutors, the following systems are recognized as remedial measures for a case where a public prosecutor declines to prosecute.

1. Petition for Complaint to Superior Authority
A public prosecutor is a public office and an individual prosecutor independently has the power and authority for criminal prosecution. On the other, the control and supervision authority of the superior prosecutors is recognized in order to maintain the unity of the organization of public prosecutors (Public Prosecutors Office Law, Art. 7-10).

[85] Except for intellectual property related lawsuits, such as a trade secret protection system in patent litigation (Patent Law, Art. 105-4), etc.

Accordingly, anyone may file a petition for superior prosecutors such as a Chief Prosecutor to invoke the authority of control and supervision over the public prosecutor in relation to an improper decision of non-prosecution. However, as this is just a petition for the exercise of the authority of control and supervision, the superior public prosecutor owes no obligation to respond to the petition.

2. Application to Commit the Case to a Court for Trial (Quasi-Prosecution Procedure)

Certain kinds of cases are more likely to be declined improperly or arbitrarily, such as a crime of abuse of power of public officers (Penal Code, Art. 193-196). In relation to these cases, the court can decide, if the prosecutor decides not to prosecute, and upon the request from a complainant (victim), etc., to refer such a case to a court for trial as if the matter had been prosecuted (Referral Decision for Trial; Code of Criminal Procedure, Art. 262 to 269). The court, when it has made a Referral Decision for Trial, nominates from lawyers a temporary public prosecutor for the case.

While there have actually been about 300 applications to commit a case to court for trial every year, only 17 Referral Decisions for Trial were made between the end of World War II and November 2005.[86] This rate of application approval is only about 0.1%. The most recent example was the decision made by the Kanazawa District Court on October 18, 1994 regarding the case of a specific public officer's act of physical violence and cruelty causing death. Since then, more than ten years have passed without a Referral Decision for Trial.

Among the seventeen cases tried after the Referral Decisions for Trial (all the cases became final and binding), in nine of the cases, a sentence of guilty was passed (a conviction rate of about 50%). The conviction rate in such cases has been much lower than that the conviction rate in general cases. Also, no one has been punished with actual imprisonment with or without work even if found guilty.[87] Sixteen out of the seventeen cases are concerned with a specific police officer's act of physical violence and cruelty or act causing death (PC, Art. 195 and 196). The other case involves an assistant judge's abuse of authority (*Id*. Art. 193).

3. The Committees for the Inquest of Prosecution

(1) Overview of System

The Committees for the Inquest of Prosecution review whether or not a decision of non-prosecution made by a public prosecutor was appropriate. It is activated upon the motion of an interested party who complains about the non-prosecution decision, or per ex officio. The system is based on the Law for the Inquest of Prosecution.

Where a prosecution inquest committee makes a resolution of "Fit for Prosecution" or "Unfit for Non-Prosecution," a public prosecutor must commence prosecution, if the prosecutor reaches an opinion, after consideration of the resolution received from the committee, that he/she should prosecute. However, if the prosecutor decides that public prosecution is still unnecessary, s/he does not have to prosecute. In this manner,

[86] Supreme Court, Criminal Affairs Bureau, "*Heisei 16-nen ni okeru Keiji Jiken no Gaikyo (Jou)* [Overview of Criminal Cases in 2004 (I)]", 58 HOSO JIHO 2.

[87] Concerning the nine cases of conviction, in one of the cases, a fine was given as penalty for the crime of physical violence, and in the other cases, the execution of the sentences was suspended.

the resolutions of the Committees are not legally binding on the public prosecutors. See (5) below, however, with respect to the recent amendment of the law in this regard.

(2) Composition of the Committees and Modality of Review

Each prosecution inquest committee consists of eleven (11) members who are selected by lot from the Japanese nationals who have the right to vote. The term of office for each member is six (6) months.

The prosecution inquest committee holds a closed-door meeting for the inquest of prosecution with attendance by eleven members. It considers the appropriateness of a decision of non-prosecution, upon a motion by an interested party, or per ex officio with a resolution of a majority of the committee members. It then makes a resolution on it. In reviewing a case, the prosecution inquest committee reviews the records of the case, as well as summoning and examining a witness or making inquiry to a government office, as necessary.

As a result of the review, a resolution of "Fit for Prosecution" is to be decided by eight (8) votes among the eleven. "Unfit for Non-Prosecution" or "Fit for Non-Prosecution" is to be decided with a simple majority of the members.

(3) Those Entitled to Motion and Subject of Review

Those who are entitled to make a motion to the Committees are: a complainant, a third party accuser, a requesting party for a certain kind of case that can be accepted (as a criminal case) only when the party requested, and a victim of a crime (or the family members of a victim, if the victim is deceased).

Cases not considered by the Committees include: where there is no decision of non-prosecution made by a public prosecutor, such as a case which is not sent nor transferred to any public prosecutor because no investigation is carried out at all (for example where police have not accepted a criminal complaint (victim accusation) or a third party accusation as a criminal case).

(4) Operation in Practice

The number of the reviewed cases by the Committees,[88] and the rate of prosecution by public prosecutors, etc. from 1949 (when the system of the Committees was established) to 2004, are as follows:[89]

- The number of motions for review: 144,192 (142,974 among them are closed.)
- The number of the resolutions of "Fit for Prosecution" and "Unfit for Non-Prosecution": 16,791 (11.7% among the closed cases above indicated.)
- The rate of public prosecution after the resolutions of "Fit for Prosecution" or "Unfit for Non-Prosecution": 7.7%

[88] The percentages of the offenses for which the cases have been reviewed are: 17.5% for death or bodily injury by negligence in the conduct of business; 12.3% for fraud; 11.0% for documentary forgery, etc. It would appear that a considerable number of them are motions for review regarding traffic accident cases.

[89] Supreme Court, Criminal Affairs Bureau, *supra*. note 86.

(Note that from 2000 to 2004, the rate of prosecution was from 25 to 35% each year, and the rate of prosecution these days is higher than that at the time of the establishment of the system.)

(5) The Law Amendment in 2004

In 2004, the Law was amended to recognize the legal binding effect of the resolution of the Committees.[90]

The new system is as follows. Where any public prosecutor does not commence public prosecution in spite of a committee's resolution of "Fit for Prosecution", an attorney appointed by a court can prosecute in place of a public prosecutor. For such an appointment, the prosecution inquest committee must reexamine the case and make a resolution for prosecution ("Prosecution Resolution") with eight (8) votes out of the eleven (11) members. The new system is to be implemented along with the "*Saiban-in* (Citizen Judge) System.[91]"

4. Notification of the Decision

In order to ensure the utility of the review process in relation to the prosecutor's exercise of discretion, notice systems disclose relevant information to the parties:

(1) Notice to the complainants and the third party accusers etc.

When a public prosecutor commences public prosecution, or makes a decision of non-prosecution, the prosecutor shall immediately notify the complainant, the accuser, or the requesting party, of that resolution. This is only the case for a criminal complaint, a third-party accusation, or where a request was made (CPC, Art. 260).

(2) Notice to Victims

In accordance with the Victim Notice System of the Public Prosecutors Offices,[92] a victim is to be notified by the Public Prosecutors Offices of the decision of prosecution or non-prosecution, the dates of trials, the result of criminal proceedings and the like, if the victim so wishes.

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[90] Historically, there had been criticisms against legally non-binding effect of the resolution of the Committees that the check mechanism had not functioned sufficiently over the public prosecution power and authority of a public prosecutor. However, the amendment of the Law was realized upon the recommendation of the Judicial System Reform Council, which responded to mounting public opinions that protection of human rights of victims and the public participation in the judicial process should be realized.

[91] To be implemented by May, 2009.The Law to Amend the Part of Code of Criminal Procedure, supplementary provision Art. 1, No. 2.

[92] As the system is operated based on an administrative notice, it is not established as the legal right of victims, and the contents of a notice and others are left to each public prosecutor's discretion.