Washington International Law Journal

Volume 19 | Number 3

7-1-2010

Mōri v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace

Hudson Hamilton

MŌRI V. JAPAN: THE NAGOYA HIGH COURT RECOGNIZES THE RIGHT TO LIVE IN PEACE

Translated by Hudson Hamilton[†]

Translator's note: The following is a translation of the Nagoya High Court's decision in *Mōri v. Japan*,[1] a case challenging the constitutionality of Japan's deployment of its Self-Defense Forces ("SDF") to the Middle East in connection with the United States-led occupation of Iraq. Beginning in December of 2003, Japan deployed ground and air forces of the SDF to the Middle East, including three C-130H "Hercules" transport aircraft which were used to airlift coalition forces and supplies between Kuwait and Baghdad.[2] In response, more than 5,700 citizens, represented by over 800 attorneys, filed lawsuits in eleven district courts across the country in one of the largest coordinated litigation efforts in modern Japanese history.[3] In *Mōri*, the plaintiffs argued that the deployment violated their "right to live in peace" [*heiwateki seizonken*],[4] provided in the Preamble of the Constitution of Japan,[5] which they defined as "the right to live in a Japan that does not engage in war or the use of military force."[6] They also argued that the deployment violated Article 9 of the Constitution, which renounces war and prohibits the use or threat of force.[7] They demanded an injunction against the deployment, a

---

[†] Juris Doctor candidate, University of Washington School of Law, expected 2011.

[1] Mōri v. Japan, (Nagoya High Ct., April 27, 2008) (unpublished decision), http://www.courts.go.jp/hanrei/pdf/20080428151610.pdf (last visited May 23, 2010) [hereinafter "Nagoya HC"]. *Mōri v. Japan* is reprinted in MŌRI MASAMICHI, HEIWATEKI SEIZONKEN TO SEIZONKEN GA TSUNAGARU HI [The Day when the Right to Live in Peace and the Right to Life Connect] 195 (2009). Pinpoint citations are to page numbers in the PDF document.

[2] Nagoya HC, *supra* note 1, at 2, 20. *See infra* Part II(2)(3), Part III(2)(3) (fourth paragraph, discussing C-130H transport aircraft).

[3] MŌRI MASAMICHI, *supra* note 1, at 12. *See generally* Jieitai Iraku Hahei Sashidome Soshō Zenkoku Bengodan Renrakukai [SDF Iraq Deployment Injunction Lawsuit National Attorney Network], http://www.stop-iraqwar.net/activity/index.html (last visited May 23, 2010). Coordinated protest litigation has existed in Japan for decades, and has been used to address such social problems as industrial pollution, discrimination against minorities, discrimination against women in the workplace, industrial policy, and AIDS policy. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987); ERIC A. FELDMAN, THE RITUAL OF RIGHTS IN JAPAN (2000).

[4] The Japanese term *heiwateki seizonken* [literally "the right to a peaceful existence"] is shorthand for *heiwa no uchi ni seizon suru kenri* [the right to live in peace], which appears in the second paragraph of the Preamble of the Constitution of Japan. There is no difference in meaning between the two terms, and both translate to "the right to live in peace." For a detailed account of the right to live in peace in Japan, *see* KOBAYASHI TAKESHI, HEIWATEKI SEIZONKEN NO BENSHŌ [Argument for the Right to Live in Peace] (2006).

[5] The second paragraph of the Preamble of the Constitution of Japan reads in relevant part: "We, the Japanese people, . . . recognize that all peoples of the world have the right to live in peace, free from fear and want." KENPŌ, pmbl.

[6] Nagoya HC, *supra* note 1, at 50.

[7] Article 9 of the Constitution of Japan reads in full: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized." KENPŌ, art. 9.

confirmation that the deployment was unconstitutional, and ¥10,000 each (approx. US$100) in damages.

The case turned on whether the right to live in peace is a "concrete right" [*gutaiteki kenri*], meaning a right that can be enforced in court. The plaintiffs argued that the Preamble, Article 9, and the individual rights provided in Chapter III of the Constitution together guarantee the right to live in peace.[8] The government argued that the right to live in peace is merely an abstract concept, not an enforceable right, and therefore the plaintiffs lacked a legal interest in the lawsuit necessary to establish standing.[9]

The Nagoya District Court held that the plaintiffs lacked standing and dismissed the case without addressing the constitutionality of the deployment under Article 9.[10] However, the district court recognized a concrete aspect of the right to live in peace, reasoning that because peace is the foundation of all human rights making their enjoyment possible, the right to live in peace is enforceable when combined with other human rights provisions.[11]

The Nagoya High Court affirmed the district court and dismissed the appeal on standing grounds, holding that the deployment did not infringe on appellants' right to live in peace.[12] However, the high court stated in dicta that, in certain situations, the right to live in peace is a concrete right.[13] The high court also stated that the integration of the SDF's air transport activities with the use of force by coalition forces in an international military conflict constituted the use of force by the SDF in violation of Article 9.[14] The Nagoya High Court's finding of a violation of Article 9 was the first since the Sapporo District Court's decision in the *Naganuma* case thirty-five years before,[15] and the first to be entered as a final judgment.[16] The high court's recognition of the right to live in peace

---

[8] Nagoya HC, *supra* note 1, at 47.

[9] *Id*. at 56-59. The government cited the Supreme Court's decision in the *Hyakuri* case, another case challenging the constitutionality of an act of the SDF under Article 9 and the right to live in peace, which held that "the peace asserted by appellants as pacifism and the right to live in peace is an abstract concept of an idea and goal, and does not arise independently as a standard for judging the validity of an act under private law in a concrete case." Ishizuka v. Japan, 43(6) MINSHŪ 385, 393, 1318 HANREI JIHŌ 3, 8 (Sup. Ct., June 20, 1989) (unofficial translation by author) (last visited May 23, 2010), http://www.courts.go.jp/hanrei/pdf/385CF7A2BB2800F249256AC300058EF4.pdf, *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 130, 135 (1996).

[10] [Tajika Decision], 1997 HANREI JIHŌ 93, 97 (Nagoya Dist. Ct., Mar. 23, 2007) [hereinafter "Nagoya DC"]. *See* Nakatani Yūji, *Heiwateki Seizonken no Gutaiteki Kenrisei wo Mitometa Nagoya Dainanaji Soshō Hanketsu* [Decision of the Seventh Nagoya Hearing Recognizing the Right to Live in Peace as a Concrete Right] 638 HŌGAKU SEMINA 44 (2008) (commenting on the Tajika decision).

[11] Nagoya DC, *supra* note 10, at 97.

[12] Nagoya HC, *supra* note 1, at 23-25. *See infra* Parts III(4)-IV.

[13] *Id*. at 22. *See infra* Part III(3) (last line of the second paragraph).

[14] *Id*. at 21. *See infra* Part II(2)(4).

[15] *See* Itō v. Minister of Agriculture and Forestry, 712 HANREI JIHŌ 24 (Sapporo Dist. Ct., Sept. 7, 1973) [hereinafter "Naganuma DC"], *translated in* BEER & ITOH, *supra* note 9, at 83 (holding that the SDF constituted land, sea, and air forces in violation of Article 9(2)), *rev'd*, Minister of Agriculture and Forestry v. Itō, 27(8) GYŌSAI REISHŪ 1175, 821 HANREI JIHŌ 21 (Sapporo High Ct., Aug. 5, 1976), *translated in* BEER & ITOH, *supra* note 9, at 112.

[16] The appellants did not appeal the decision, and the government was unable to appeal because it won the case. However, because the case was dismissed, the decision was not binding against the government. *See* Kobayashi Takeshi, *Jieitai Iraku Hahei Iken: Nagoya Kōsai Hanketsu no Igi* [Unconstitutionality of the Iraq Deployment: The Significance of the Nagoya High Court Decision], 80(8) HŌRITSU JIHŌ 1 (2008).

was also the first since *Naganuma*,[17] breaking from a series of lower court decisions that dismissed the right to live in peace as merely an abstract concept.[18] Less than a year later, the Okayama District Court followed the Nagoya High Court in recognizing the right to live in peace in a similar SDF Iraq Deployment case, and provided further detail regarding the right's substance.[19] The Nagoya and Okayama decisions suggest the emergence (or revival) of a new human right in Japan: the right to live in peace.

Case Number: Heisei 19 (Ne) 58
Title: Appeal Requesting Injunction Against the Deployment of the Self-Defense Forces to Iraq
Date of Decision: April 17, 2008
Court: Nagoya High Court, Third Civil Division

JUDGMENT

1. All claims are dismissed.
2. Appellants shall bear the costs of the appeal.

FACTS AND REASONS

I. REQUESTS OF THE PARTIES

1. Appellants
   (1) Overturn the district court's decision.
   (2) Requests of appellants A, B, C, and D (hereinafter collectively "Appellant A")[20]

---

[17] The Sapporo District Court in *Naganuma* held that the SDF missile site at issue would be a "first target" of attack from a foreign country in times of emergency, violating the plaintiffs' right to live in peace. Naganuma DC, *supra* note 15, at 65.

[18] *See, e.g.*, Higashi v. Nakasōne, 1336 HANREI JIHŌ 45, 81 (Osaka Dist. Ct., Nov. 9, 1989) (challenging an official visit by Prime Minister Nakasōne to Yasukuni Shrine); Hashimoto v. Ōta, 47(3) GYŌSAI REISHŪ 192, 273-75, 1563 HANREI JIHŌ 26, 53-54 (Fukuoka High Ct., Mar. 25, 1996), *available at* http://www.courts.go.jp/hanrei/pdf/0338002D010B9F4149256D41000A793E.pdf (challenging an order of the Prime Minister allowing the U.S. military to continue operation of the Futenma Air Base in Okinawa); Aoki v. Japan, 1577 HANREI JIHŌ 104, 118 (Osaka Dist. Ct., Mar. 27, 1996) (challenging the deployment of a maritime minesweeper unit to the Persian Gulf and the donation of $9 billion to the Gulf Peace Fund); Aihara v. Japan, 1619 HANREI JIHŌ 45, 50 (Tokyo Dist. Ct., Mar. 12, 1997) (challenging the deployment of the SDF to Cambodia to participate in U.N. peacekeeping operations).

[19] Okayama District Court, Feb. 24, 2009 (unpublished decision), http://www.tkclex.ne.jp/commentary/zn/zn25450745.html (last visited May 22, 2010). *See* Nagayama Shigeki, *Jieitai no Iraku Hahei to Heiwateki Seizonken no Shingai* [Iraq Deployment of the SDF and Violation of the Right to Live in Peace], 654 HŌGAKU SEMINA 126 (2009) (commenting on the Okayama District Court decision).

[20] *Translator's note*: Japanese courts often use letters in place of party names for privacy concerns. "Appellant A" is Mōri Masamichi, a Japanese attorney who also represented another group of plaintiffs in a similar SDF Iraq Deployment case in Kōfu District Court. MŌRI MASAMICHI, *supra* note 1, at 195. *See*

A. Appellee must not deploy the Self-Defense Forces ("SDF") under the Act on Special Measures Concerning the Implementation of Humanitarian Reconstruction Support Activities and Support Activities Maintaining Security in Iraq (hereinafter "Iraq Special Measures Act") [21] to Iraq, its surrounding areas and waters.

B. Confirm that appellee's deployment of the SDF to Iraq and the neighboring areas under the Iraq Special Measures Act is unconstitutional.

(3) Request of all appellants: that appellee pays each appellant ¥10,000.

(4) Appellee bears the costs of appeal for parts I and II.

2. Appellee: requests the same as the judgment.

II. SUMMARY OF THE CASE

1. In this case, the appellants, who claim that the deployment of the SDF to Iraq and its surrounding areas based on the Iraq Special Measures Act (hereinafter "Deployment." In addition, the Republic of Iraq and its surrounding areas will hereinafter be referred to as "Iraq.") is unconstitutional, claim that their right to live in peace, including "the right to live in a Japan that does not engage in war or the use of military force" (hereinafter collectively referred to as the "right to live in peace") was violated by this Deployment, and based on the State Redress Act (Article 1(1)), each individually seeks ¥10,000 in damages (hereinafter "Request for Damages"), an injunction against a Deployment of Appellant A (hereinafter "Request for Injunction"), as well as a confirmation that the Deployment is unconstitutional for violating Article 9 of the Constitution (hereinafter "Request for Confirmation of Unconstitutionality"). After the lower court rejected Appellant A's claims for a Request for Injunction and a Request for Confirmation of Unconstitutionality as improper, and dismissed appellants' Request for Damages, appellants appealed.

[SDF Iraq Deployment Case], 1194 HANREI TAIMUZU 117 (Kōfu Dist. Ct., Oct. 25, 2005), *available at* http://www.courts.go.jp/hanrei/pdf/20060811180117.pdf.

[21] *Translator's note*: the Iraq Special Measures Act is available in Japanese at Iraku ni okeru Jindō Fukkō Shien Katsudō oyobi Anzen Kakuho Shien Katsudō no Jisshi ni kansuru Tokubetsu Sochi Sō [Act on Special Measures Concerning the Implementation of Humanitarian and Reconstruction Support Activities and Support Activities Ensuring Safety in Iraq], Law No. 137 of 2003 (revised by Law No. 101 of 2007), *available at* http://law.e-gov.go.jp/htmldata/H15/H15HO137.html.

2. Given Facts (public knowledge and facts evident to this court)
   (1) On July 26, 2003, during the 156th session of the Diet, the Iraq Special Measures Act (Act No. 137 of 2003) was approved for a period of four years, and on August 1st of the same year was promulgated and went into effect.
   (2) On December 9, 2003, the cabinet decided on a basic plan under this Act (hereinafter simply "Basic Plan") regarding the humanitarian reconstruction support activities and support activities maintaining security (hereinafter "Response Measures").
   (3) The Director General of the Defense Agency (prior to the revision under Act No. 118 of Dec. 2006; same below),[22] following the Basic Plan, established deployment guidelines for the contribution of service by the SDF to be carried out as Response Measures, and after receiving approval for these deployment guidelines from the Prime Minister issued a mobilization order to the SDF, as well as a deployment order to the Air SDF advance unit. The Director General deployed the Air SDF advance unit to Iraq and the State of Kuwait (hereinafter "Kuwait") from December 26, and later issued a deployment order to the Ground SDF, deploying them from January 16, 2004 to Samawah in the Al Muthanna Governorate in southern Iraq.
   (4) The Ground SDF completely withdrew from Samawah on July 17, 2006. However, the Air SDF continues air transport activities of supplies and personnel from Kuwait to Baghdad, the capital of Iraq (a cabinet order partially changed the Basic Plan in August of 2006).
   (5) On June 20, 2007, during the 166th session of the Diet, the Iraq Special Measures Reform Act (Act No. 101 of 2007) was passed, which extended the SDF deployment to Iraq by 2 years, and the Air SDF to this day continues to conduct air transport activities.
3. Claims of the Parties: see attachment.

III. DECISION OF THIS COURT

1. For the following reasons, this court holds that Appellant A's Request for Confirmation of Unconstitutionality and Request for Injunction

[22] *Translator's note*: The Japan Defense Agency was upgraded to a Ministry on January 9, 2007.

are improper and must be rejected, and appellants' Request for Damages must be dismissed.

2. Regarding the Unconstitutionality of the Deployment

(1) Certified Facts. The following facts, synthesized from public knowledge, facts evident from this trial, evidence (officially recorded in each section), and the overall effect of the arguments, are recognized.

***

[*translator's note*: the court's description of the situation in Iraq is omitted]

***

(2) The Iraq Special Measures Act and the Government's Interpretation of Article 9 of the Constitution

1. The government's interpretation of Article 9 of the Constitution in relation to overseas activities of the SDF is that the minimum use of military force necessary for self-defense is permitted (written answer of the government of Dec. 5, 1980). Given that the use of military force is an act of combat linked to an international military conflict using Japanese physical or human organizations (answer of the government submitted by the House of Representatives Special Committee on Peacekeeping Operations on September 27, 1991), overseas activities of the SDF consist of the following:

i. an "overseas military deployment" for the purpose of using military force is not permitted, but an "overseas deployment" not for the purpose of using military force is permitted (written answer of the government of October 28, 1980);

ii. cooperation that does not constitute participation in the use of military force by another country (such as transporting, supplying, or medical care) is nevertheless evaluated as our use of military force when such cooperation is integrated with the use of force by that country and is thus not permitted under the Constitution, however cooperation that is not integrated with the use of military force of another country is permitted (answer of Cabinet Legislation Bureau Director-General Ōmori in the House of Representatives Budget Committee on February 13, 1997); and

iii. whether such cooperation is integrated with the use of military force by another country is determined on a case-by-case basis by comprehensively considering various factors such as (a) the geographical relationship between the site of the relevant activities and the place where the combat activities are taking place or are planned to take place, (b) the specific content of the relevant activities, and (c) the current state of the activities of the party we are attempting to cooperate with (answer of Cabinet Legislation Bureau Director-General Ōmori, *supra*).

2. Under this government interpretation, the Iraq Special Measures Act can be understood to provide that our country shall conduct humanitarian reconstruction support activities and support activities maintaining security (hereinafter "Response Measures") (Article 1), the implementation of which must not constitute the threat or use of military force (Article 2(2)), and such Response Measures shall only be conducted inside Japan and in designated areas where it is recognized that no acts of combat (acts of killing or destruction linked to an international military conflict) are being conducted, nor will any such act of combat be conducted for the duration of the activities (non-combat areas) (Article 2(3)).

3. The government expresses the following viewpoints: an "international military conflict" as mentioned herein is a conflict between countries or country-like organizations using military force that goes beyond the internal problems of one country (answer of Defense Agency Director-General Ishiba in the House of Representatives Special Committee of June 26, 2003); the existence of an act of combat should be individually and specifically decided in response to the realities of the corresponding act, including its internationality, planning, organization, and continuity (answer of Defense Agency Director-General Ishiba in the House of Representatives Special Committee of July 7, 2003); although not all uses of force by the U.S. and British military against criminal organizations are considered uses of force in a military conflict under international law (answer of Cabinet Legislation Bureau Second Department Director-General G in the House of Representatives Foreign Affairs Committee of June 13, 2003;

answers of Cabinet Legislation Bureau Director-General Akiyama in the House of Representatives Iraq Special Committee of July 2, 2003 and in the House of Councillors Diplomacy and Defense Committee of July 10, 2003), if it is determined, in individual and specific cases, that the subject of such acts has a defined political cause, and such subject is an organization with military capability or with the capability of becoming a party to an international conflict, and destructive activities are being conducted by such subject based on its political cause, then such acts can be considered to be by a country-like organization (answer of Cabinet Legislation Bureau Director-General Akiyama, *supra*); acts where the organization, planning, or continuity are unclear, such as terrorist acts limited to domestic security problems, sporadic gunfire, or small-scale attacks are not recognized as being executed based on the will of a country or a country-like organization, and thus do not constitute acts of combat; as a concrete example of a country or a country-like organization, if remnants of the Hussein regime were continuing to oppose the U.S. and British military with the aim of restoring the Hussein regime, then this would constitute an act of combat, however if such an organization, even though they were remnants of the Hussein regime, were merely looting to procure provisions for daily life, then this would not constitute an act of combat (answer of Defense Agency Director-General Ishiba in the House of Representatives Special Committee on July 2, 2003); non-combat areas do not necessarily mean safe areas, and "combat zones" as designated by the U.S. military are not synonymous with combat areas (answer of Defense Agency Director-General Ishiba in the House of Representatives Special Committee of June 25, 2003; answer of Foreign Affairs Minister Asō in the House of Representatives Special Committee of August 11, 2006).

(3) Given the above investigation, and according to the preceding certified facts, even after the declaration by President Bush of the end of major combat operations in May of 2003, the multi-national force, centered around the U.S. military, mobilized many troops in the cities of Fallujah, Baghdad, and Ramadi, repeatedly conducting search-and-destroy missions for armed insurgent groups, at times using powerful bombs, chemical weapons,

inhumane weapons, or violent aerial bombardments. Armed insurgents fought back using commensurate force, at times using weapons that rivaled those of the multi-national force, and the result was grave and terrible suffering with many deaths on both sides, many civilians killed including children, homes destroyed, city functions lost, and many people forced to become refugees and migrate to neighboring countries. The insurgent groups who are the target of these search-and-destroy missions, including remnants of the Hussein regime, the Shiite Mahdi army, and Sunni extremists, are not merely groups conducting sporadic gunfire and small-scale attacks, nor can they be called criminal groups of thieves looting to procure provisions for daily life. Although the full reality is unclear, each receives aid from overseas powers, and while receiving this support, with the defined political goal of opposing the stationing of the U.S. military, they maintain considerable military force, with members in the thousands or tens-of-thousands and increasing each year, and they conduct organized and planned resistance to the multi-national force, continuing their resistance five years after the start of the Iraq offensive. Therefore, the activities of the multi-national force to suppress this resistance exceed simple security activities, and at least at present, inside Iraq, in addition to the conflict between insurgent groups rooted in the religious opposition that arose after the end of the Iraq offensive, there is conflict between insurgent groups and the multi-national force, and all this can be called an entwined and bogged down state of war. This is also clear in light of the fact that the U.S. military has for these five years regularly stationed 130,000 to 160,000 military personnel in Iraq, spending more than it did in the Vietnam War, and although this includes damage from sporadic and unorganized suicide bombings, many deaths continue on both sides, without a satisfactory recovery of security.

From the above it can be said that at present in Iraq an international military conflict is being conducted between the multi-national force and insurgent groups who from their substance can be recognized as country-like organizations, and it is a dispute using military force that goes beyond the internal security problems of a single country. Above all, the capital Baghdad, even in 2007, is an area where victims from both sides as well as average citizens continue to be killed, with the U.S.

military expanding its many search-and-destroy missions targeting Shiite and Sunni insurgent groups, and the insurgent groups resisting with commensurate force. This is truly an area where acts of killing and destruction linked to an international military conflict are being conducted, and can thus be recognized as a "combat area" under the Iraq Special Measures Act.

Still, even if the stationing of the multi-national force in Iraq and its combat with insurgent groups is based on the request of the Iraqi government with the understanding and support of the United Nations (Security Council Decision Nos. 1483, 1546), in light of the fact that the Iraq offensive which began in March of 2003 and the disorder from the religious opposition that the offensive brought about has yet to be resolved, and the fact that the Iraqi government gained the support of the multi-national force made up of foreign troops because at present it cannot oppose these insurgent groups alone, it can be said that the conflict inside Iraq between the multi-national force and the insurgent groups is substantively an extension of the first Iraq offensive, and is an international conflict between the foreign multi-national force and the Iraq domestic insurgent groups. Even seen from this point, the present condition of combat is that of an international conflict.

Although the details are unclear as the government has not disclosed them to the Diet or the people, the following facts can be recognized: the Air SDF, as certified above, has conducted air transport activities to Baghdad airport since around July of 2006, regularly transporting armed military personnel of the multi-national force four or five times per week from Ali Al Salem airport to Baghdad airport using three C-130H transport aircraft developed by the U.S. for transporting paratroopers; this is being done at the request of the U.S. after the Ground SDF withdrew from Samawah, and the U.S. military reinforced U.S. troops in Baghdad during this same transport period in around August of 2006, intensifying its search-and-destroy missions in Baghdad from around the end of that year; prior air transport activities were coordinated and planned by the U.S. and British militaries in the U.S. Central Command in Qatar, and it is inferred that air transport activities since July of 2006 have been conducted under the coordination of the U.S. military as well; C-130H transport aircraft are equipped with flares to defend against attacks from

surface-to-air missiles, and these flares, after completing prior training, are actually being used during takeoff and landing at Baghdad airport; the Defense Minister has answered to the effect that even though the U.S. military is tightly defending Baghdad airport, there is a real danger of attack both inside the airport and during takeoff and landing; and there is no evidence that, when the Air SDF transports armed personnel of the multi-national force, the personnel are limited to those not related to the use of military force in search-and-destroy missions in Baghdad. Taken together, it can be said that the air transport activities of the Air SDF are mainly being conducted in the name of support activities maintaining security under the Iraq Special Measures Act, and even assuming this in itself does not constitute the use of military force, the Air SDF is regularly and certainly transporting armed military personnel of the multi-national force, who can be inferred to include anti-insurgent combatants, under the close coordination of the multi-national force and in places geographically close to areas where acts of combat between the multi-national force and insurgent groups are taking place. Considering the fact that in modern warfare supplying activities such as transport are an important element of acts of combat (B141, point of appellant's argument), it can be said that the Air SDF is conducting military logistical support that is indispensible to the acts of combat of the multi-national force. Therefore, such air transport activities of the Air SDF, at least in regards to transporting armed military personnel of the multi-national force to Baghdad, in light of the answer of Cabinet Legislation Bureau Director-General Ōmori of February 13, 1997, are integrated with the use of military force by another country, and must be evaluated as our use of military force as well.

(4) Therefore, the air transport activities of the Air SDF presently being carried out in Iraq, under the same interpretation of the Constitution as the government, even assuming the Iraq Special Measures Act is constitutional, include activities that violate Article 2(2) of the Iraq Special Measure Act prohibiting the use of military force, Article 2(3) limiting the area of activities to non-combat areas, and furthermore, Article 9(1) of the Constitution.

3. The Right to Live in Peace upon which the Request for Injunction is Based

The right to live in peace, expressed in the Preamble of the Constitution as "the right to live in peace,"[23] is defined as, for example, "the fundamental human right to live in peace, free from fear and want, uninfringed and unrestricted due to destruction resulting from war, armaments or war preparation, with the essence of a natural right in the nuclear age that can create a peaceful country and world," and is an extremely diverse and broad right, as shown by the differing expressions advocated by the appellants, including "the right to live in a Japan that does not engage in war or the use of military force," "the right to not contribute to the taking of the life of another through war or the military," "the right to live in peace based on one's peaceful convictions, and not be involved with damaging acts by military measures against the people of another country," and "the right to live and stand against war, against violence, and for pacifism, aspiring to peace based on faith, and pursuing the happiness of all people."

From the fact that the fundamental human rights presently guaranteed by the Constitution could not exist without a foundation of peace, the right to live in peace can be called a foundational right at the base of all fundamental human rights making their enjoyment possible, and goes beyond a simple expression of the basic spirit or idea of the Constitution. From the fact that the Preamble of the Constitution, which must be said to have legal normative character,[24] famously expresses "the right to live in peace," and in addition Article 9 of the Constitution provides for the renunciation of war and

---

[23] *Translator's note*: The court refers to *heiwateki seizonken* [literally "the right to a peaceful existence"] and to *heiwa no uchi ni seizon suru kenri* [the right to live in peace]. There is no difference in meaning between the two terms, and both translate to "the right to live in peace." *See supra* text accompanying note 4.

[24] *Translator's note*: Legal normative character [*hō kihansei*] refers to a provision's nature as a legal norm [*hō kihan*]. Constitutional provisions in Japan are classified as either "legal norms" [*hō kihan*] or "judicial norms" [*saiban kihan*] depending on their legal effect. A legal norm is a provision that can be used to interpret another provision; it is a broad term that encompasses all provisions of the Constitution, including the Preamble. A judicial norm is a provision that can be relied on independently to determine the constitutionality of a law or order in an exercise of constitutional review. A judicial norm must have sufficiently definite, or "concrete" [*gutaiteki*] substance to provide a standard for judicial decision-making. In the context of human rights provisions, a judicial norm corresponds to a "concrete right" [*gutaiteki kenri*]. A provision that lacks concreteness is characterized as "abstract" [*chūshōteki*] and does not rise to a judicial norm. *See* KOBAYASHI, *supra* note 4, at 34-39. The distinction between concrete and abstract rights reflects the broader political meaning of the term "right" [*kenri*] in the Japanese language, implying more than a legally enforceable duty. *See* FELDMAN, *supra* note 3, at 1-15.

prohibits the maintenance of war potential as an objective system from the side of government action, and furthermore, Chapter III of the Constitution, beginning with the personal rights provided for in Article 13, provides for individual fundamental human rights, the right to live in peace must be recognized as a legal right under the Constitution. The right to live in peace can be called a compound right that can be expressed as a freedom right, a social right, or a political right, depending on the circumstances, and there are situations where its character as a concrete right can be affirmed, meaning its protection and relief can be requested through invoking legal enforcement measures in a court of law. For example, if, due to acts of state that violate Article 9 of the Constitution, in other words the execution of war, the use of military force, or acts of military preparation, an individual's life or freedom are infringed or threatened with being infringed, or if an individual is forced to contribute to or cooperate with the execution of war in violation of Article 9, then mainly as a manifestation of the freedom right aspect of the right to live in peace, it can be interpreted that there are situations where relief can be sought in a court of law through such methods as a request for injunction against the unconstitutional act or a request for damages, and to that extent the right to live in peace has the character of a concrete right.

Still, there is a point of view denying the possibility of characterizing the right to live in peace as a right, or a concrete right, based on the fact that "peace" is an abstract concept, and that there are so many ways to define and achieve peace, however constitutional concepts are generally abstract, and filled in by interpretation. For example, even "freedom" and "equality" have many ways of achievement, and there is no reason to single out the right to live in peace and deny it the possibility of being characterized as a legal right or a concrete right because the concept of peace is abstract.

4. Requests of the Appellants

(1) Appellant A's Request for Confirmation of Unconstitutionality

Because the system of civil litigation seeks to settle disputes between parties involving present rights or legal relationships, the target of a confirmation must be a present right or legal relationship. However, this Request for Confirmation of Unconstitutionality seeks to confirm that an actual act is abstractly unconstitutional, and does not involve a present right

or legal relationship, so this request is improper for lacking a confirmation interest.

(2) Appellant A's Request for Injunction

1. Legality as a Civil Action

The Iraq Special Measures Act provides for the following specific procedures for implementing Response Measures: (i) the Prime Minister seeks a cabinet decision for implementation of Response Measures and a Basic Plan proposal (Article 4(1), same for changes to the Basic Plan, Article 4(3)); (ii) the Prime Minister must seek approval from the Diet for the Response Measures (Article 6(1)); (iii) the Defense Minister establishes the implementation guidelines for the Response Measures, and after receiving approval from the Prime Minister, orders SDF units to implement them (Article 8(2), same for changes to the implementation guidelines, Article 8(9)). From these provisions, the deployment of the SDF to Iraq under the Iraq Special Measures Act is essentially a use of governmental authority under the administrative power granted to the Defense Minister based on the provisions of the Iraq Special Measures Act, so the Request for Injunction seeking to prohibit the Deployment necessarily includes a request seeking the cancellation or invocation of the Defense Minister's use of the aforementioned administrative power. Thus, because precedent has established that private citizens do not have the right to request civil remedies for such uses of administrative power (*see, e.g.*, Supreme Court, Grand Bench, Decision of Dec. 16, 1981, Minshū vol. 35, no. 10, p. 1369), the Request for Injunction is improper.

2. Legality as an Administrative Appeal (*kōkoku* appeal)

Therefore, we will consider the Request for Injunction as though it were filed as an administrative appeal (*kōkoku* appeal).

The Deployment, as stated above, includes illegal and unconstitutional activities, and according to the overall effect of the relevant evidence and arguments, has greatly impacted Appellant A. However, the Deployment was not directed at Appellant A, nor was Appellant A's life or freedom infringed or endangered, nor was Appellant A injured or put in fear of actual war, nor did events come to forcing Appellant A to contribute to or cooperate in an execution of war that violates Article 9 of the

Constitution, and from all the evidence, at present, it cannot be recognized to have violated Appellant A's right to live in peace as a concrete right. Thus, Appellant A does not have a legal interest in seeking the cancellation of the Defense Minister's order, and does not have standing for an administrative appeal (*kōkoku* appeal). Therefore, even assuming the Request for Injunction was claimed as an administrative appeal (*kōkoku* appeal), we cannot escape concluding it is improper.

(3) Appellants' Request for Damages

According to the overall effect of the relevant evidence and arguments, appellants each have a strong faith and belief in peace backed up by serious life experiences, and they bring this Request for Damages for the mental anguish they have suffered due to the Deployment that includes violations of Article 9 of the Constitution. These compelling sentiments include many parts that must be sympathized with as Japanese citizens under the pacifist Constitution, and should not be regarded as no more than the personal indignation of political losers under an indirect democracy, as discomfort, or as frustration.

However, as stated above regarding Appellant A's Request for Injunction, the Deployment cannot be recognized to have gone as far as violating appellants' right to live in peace as a concrete right, and we cannot recognize that a violation of appellants' interests sufficient to sustain a request for damages in a civil action has yet occurred. Therefore, we cannot recognize appellants' Request for Damages.

IV. CONCLUSION

As stated above, we hold that the decision of the lower court was proper, and this appeal is dismissed.

Nagoya High Court, Third Civil Division

Chief Judge AOYAMA, Kunio
Judge TSUBOI, Nobuyuki
Judge UESUGI, Eiji