

2009, District Court of Aomori, Japan

Case of Mr. Junichi Sato and Mr. Toru Suzuki

Legal Opinion on the obligations of Japan under article 19 of the International Covenant on Civil and Political Rights and a general analysis of the protection of freedom of expression in international human rights law

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1. Qualifications and Expertise

In 2000 I was appointed Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway. I teach courses on international human rights law, international criminal law, and genocide, among others. From 2002-2004 I served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. From 2006-2008 I served on the United Nations Board of Trustees of the Voluntary Fund for Technical Cooperation in the Field of Human Rights. I was inducted as an Officer of the Order of Canada in 2006 and elected as a member of the Royal Irish Academy in 2007.

I have published twenty-nine books and monographs on international human rights law and international criminal law, including *International Human Rights Law and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed., Toronto: Carswell, 2007 (with Stéphane Beaulac), and, most recently, *Genocide in International Law*, 2nd ed., Cambridge: Cambridge University Press, 2009. I have written over 250 articles and book chapters on international human rights law and international criminal law in peer reviewed journals, including the American Journal of International Law, European Journal of International Law, Human Rights Quarterly, Human Rights Law Journal, Journal of International Criminal Justice, Criminal Law Forum, International Criminal Law Review, International Review of the Red Cross, and International and Comparative Law Quarterly.

I have been qualified as an expert in international human rights law before various domestic and international courts, including the following: Constitutional Court of Indonesia; Westminster Magistrates Court (London); Superior Court of Quebec; and Federal Court of Canada.

Please find enclosed herewith a copy of my curriculum vitae.

2. Instructions from Greenpeace Japan

I have been asked by Greenpeace Japan to provide a legal opinion on the obligations of Japan under article 19 of the International Covenant on Civil and Political Rights and a general analysis of the protection of freedom of expression in international human rights law. I understand that Professor dr. Dirk Voorhoof has been asked by Greenpeace Japan to provide a detailed legal opinion on the protection of freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. Summary of Legal Opinion

Based on the information about the present case provided to me by Greenpeace Japan, the freedom of expression of Mr. Junichi Sato and Mr. Toru Suzuki is a relevant legal issue in their criminal trials. Articles 19(2)-(3) of the International Covenant on Civil and Political Rights, which oblige Japan to respect, protect, and fulfil the freedom of expression of Mr. Sato and Mr. Suzuki, directly apply to the present litigation before the District Court of Aomori. The jurisprudence of foreign and international courts, including the European Court of Human Rights, is a useful and persuasive source of international human rights law to assist the District

Court of Aomori in faithfully observing Japan's treaty obligations under articles 19(2)-(3) of the International Covenant on Civil and Political Rights and articles 21 and 98(2) of the Constitution of Japan.

There is a general rule in international human rights law that a journalist or campaigner cannot be released from his or her duty to obey domestic criminal law on the basis that article 19 of the International Covenant on Civil and Political Rights affords him or her protection. However, there is authority from the Supreme Court of Japan and the European Court of Human Rights that there are exceptions to this rule. According to this jurisprudence, in determining whether the conviction or sentence of either of the accused in the present case would constitute a necessary restriction on his freedom of expression within the meaning of article 19(3) of the International Covenant on Civil and Political Rights, the District Court of Aomori should analyse the complete factual record in light of the relevant factors identified below in order to properly balance the interests involved. If these factors are weighed by the District Court of Aomori in favour of Mr. Sato and Mr. Suzuki, then they should be found not guilty of the charges against them, or, in the alternative, minor sentences should be imposed.

4. Legal Opinion

4.1. Issue 1: Legal Relationship between the International Covenant on Civil and Political Rights and Japan

A) Legal Obligations of Japan under Article 2 of the International Covenant on Civil and Political Rights

Japan signed and ratified the International Covenant on Civil and Political Rights on 30 May 1978 and 21 June 1979, respectively. Article 2 of the International Covenant on Civil and Political Rights obliges Japan to respect, protect, and fulfil the human rights recognized in the International Covenant on Civil and Political Rights.¹ All branches of the government of Japan, including the judiciary, may engage the responsibility of Japan for a violation of one of the human rights recognized in the International Covenant on Civil and Political Rights, such as freedom of expression in article 19.²

B) Legal Value of the Jurisprudence, Concluding Observations, and General Comments of the United Nations Human Rights Committee

The United Nations Human Rights Committee is the organ established under the International Covenant on Civil and Political Rights charged with the interpretation of that legal instrument.³ The members of the Human Rights Committee possess “recognized competence in the field of human rights”⁴ and represent “the different forms of civilization and...the principal legal systems.”⁵ Before taking up

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and 1057 UNTS 407, art. 2; United Nations Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004) (“HRC General Comment No. 31”).

² HRC General Comment No. 31, *ibid.*

³ United Nations Human Rights Committee, General Comment No. 33, UN Doc. CCPR/C/GC/33 (5 November 2008) (ADVANCE UNEDITED VERSION) at paras. 13-15.

⁴ International Covenant on Civil and Political Rights, *supra* note 1 at art. 28(2).

⁵ *ibid.* at art. 31(2).

his/her duties, every member of the Human Rights Committee makes “a solemn declaration in open committee that he will perform his functions impartially and conscientiously.”⁶ Professor Dr. Yuji Iwasawa of Japan is currently a member of the Human Rights Committee.

Although Japan has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights,⁷ the Views or jurisprudence of the Human Rights Committee under the Optional Protocol represent an authoritative and persuasive interpretation of the International Covenant on Civil and Political Rights. Insofar as they interpret the International Covenant on Civil and Political Rights, the Concluding Observations and General Comments of the Human Rights Committee possess a similar legal character.⁸ As the Osaka High Court declared in 1994:

‘General Comments’ and ‘views’ [or jurisprudence of the Human Rights Committee] should be relied upon as supplementary means of interpretation of the ICCPR [International Covenant on Civil and Political Rights].⁹

C) Legal Obligations of Japan under Articles 19(2)-(3) of the International Covenant on Civil and Political Rights

Article 19(2) of the International Covenant on Civil and Political Rights obliges Japan to respect, protect, and fulfil the following human rights of Mr. Junichi Sato and Mr. Toru Suzuki, the two accused on trial in the present case:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Since the exercise of the human rights recognized in article 19(2) carries with it “special duties and responsibilities,” article 19(3) of the International Covenant on Civil and Political Rights permits restrictions on them when the following three cumulative conditions are satisfied:

1. The restriction must be provided by law;
2. The restriction must address one of the purposes set out in articles 19(3)(a)-(b) (respect of the rights or reputations of others or the protection of national security or of public order (*ordre public*), or of public health or morals); and
3. The restriction must be necessary to achieve the legitimate purpose.¹⁰

In the *Courtroom Note-Taking* case of 1989, a Grand Bench of the Supreme Court of Japan stated that article 19(3) of the International Covenant on Civil and Political Rights “provides only that a statutory provision is necessary to impose

⁶ *ibid.* at art. 38.

⁷ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸ Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (Clarendon Press: Oxford, 1998) at 116-22.

⁹ Judgt 28 Oct. 1994, Osaka High Ct, 1513 *HANREI JIHŌ* 71, 87, 38 *JAPANESE ANN. INT'L L.* 118 (1995), reproduced in Iwasawa, *supra* note 8 at 118.

¹⁰ *Sohn v. Republic of Korea*, United Nations Human Rights Committee, UN Doc. CCPR/C/54/D/518/1992 (3 August 1995) at para. 10.4; HRC General Comment No. 31, *supra* note 1 at para. 6.

restriction on the exercise of the rights with regard to freedom of expression, including the freedom of taking in information etc.”¹¹ Pursuant to the requirements of article 19(3) as listed above, a restriction on freedom of expression that is provided by law will be considered “necessary” only when the prescribed law addresses one of the purposes enumerated in articles 19(3)(a)-(b) of the International Covenant on Civil and Political Rights and the law is necessary to achieve that legitimate purpose.¹²

The Human Rights Committee has observed that Japan appears to take a “restrictive approach in certain laws and decisions as to the respect of the right to freedom of expression.”¹³ Based on its concern that “the concept of ‘public welfare’ [in articles 12, 13, and 29 of the Constitution of Japan] is vague and open-ended and may permit restrictions exceeding those permissible under the Covenant”, the Human Rights Committee has strongly recommend to Japan that it “adopt legislation defining the concept of ‘public welfare’ and specifying that any restrictions placed on the rights guaranteed in the Covenant on grounds of ‘public welfare’ may not exceed those permissible under the Covenant.”¹⁴

D) Legal Status of the International Covenant on Civil and Political Rights in Relation to Japanese Law

The International Covenant on Civil and Political Rights prevails over incompatible provisions in Japanese statutes, such as the Penal Code of Japan.¹⁵ Article 27 of the Vienna Convention on the Law of Treaties,¹⁶ to which Japan acceded on 2 July 1981, prohibits Japan from invoking “the provisions of its internal law as justification for its failure to perform” the obligations set out in the International Covenant on Civil and Political Rights. The Japanese judiciary is bound by articles 76(3) and 98(2) of the Constitution of Japan to ensure that the International Covenant on Civil and Political Rights is “faithfully observed.”¹⁷ As Justice Katsushige Kotani of the Supreme Court of Japan wrote in 1959, with article 98(2) “Japan has pledged to the world that she would henceforth respect and uphold her international commitments.”¹⁸

E) Direct Applicability of Articles 19(2)-(3) of the International Covenant on Civil and Political Rights before the District Court of Aomori

Articles 19(2)-(3) of the International Covenant on Civil and Political Rights directly apply to the present litigation before the District Court of Aomori.¹⁹ Unlike the United States, Japan did not attach a declaration to its signature or ratification of the International Covenant on Civil and Political Rights that precludes the direct applicability of the Covenant before Japanese courts. The Government of Japan has

¹¹ Case number 1988(O)No.436 (8 March 1989) at para. V.2.

¹² Iwasawa, *supra* note 8 at 86-87.

¹³ Concluding Observations of the Human Rights Committee to Japan, UN Doc. CCPR/C/79/Add.128 (5 November 1993) at para. 14.

¹⁴ Concluding Observations of the Human Rights Committee to Japan, UN Doc. CCPR/C/JPN/CO/5 (18 December 2008) at para. 10; Concluding Observations of the Human Rights Committee to Japan, UN Doc. CCPR/C/79/Add.102 (19 November 1998) at para. 8.

¹⁵ Concluding Observations (5 November 1993), *supra* note 13 at para. 8; Iwasawa, *supra* note 8 at 95-96.

¹⁶ 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

¹⁷ Constitution of Japan, arts. 76(3) and 98(2).

¹⁸ Sunakawa Case, Case Number 1959(A)No.710 (16 December 1959), Supreme Court of Japan, Separate Concurring Opinion of Justice Katsushige Kotani at para. 2.

¹⁹ Iwasawa, *supra* note 8 at 49-56.

provided to the Human Rights Committee seven recent examples where a right recognized in the International Covenant on Civil and Political Rights has been invoked before Japanese courts.²⁰ For example, on 9 September 2002, the Supreme Court First Petty Bench ruled that articles 19 and 25 of the International Covenant on Civil and Political Rights were not violated by provisions of the Public Offices Election Law prohibiting door-to-door canvassing and prescribing restrictions on distribution of written materials.²¹

F) Articles 19(2)-(3) of the International Covenant on Civil and Political Rights as Aids to Japanese Constitutional Interpretation

The constitutional duty on the Japanese judiciary to faithfully observe articles 19(2)-(3) of the International Covenant on Civil and Political Rights may be accomplished by accommodating these provisions by means of constitutional interpretation, as in Canada, for example, where international human rights law is “relevant and persuasive” to an interpretation of the *Canadian Charter of Rights and Freedoms*.²² As the Government of Japan stated to the Human Rights Committee in its Fourth Periodic Report under article 40 of the International Covenant on Civil and Political Rights, “[S]ince the Constitution can be interpreted as covering the same range of human rights as the Covenant, as outlined above, there can be no conflict between the Constitution and the Covenant.”²³ This means that the Constitution of Japan should be interpreted in such a way as to comply with the International Covenant on Civil and Political Rights, and specifically with article 19.

In a significant judgment, the use by the Supreme Court of Japan of article 7 of the Universal Declaration of Human Rights²⁴ as an aid in the interpretation of article 14 of the Constitution of Japan significantly broadened the protection of human rights under it. The Supreme Court concluded:

Although article 14 [of the Japanese Constitution] is targeted directly to Japanese nationals, its tenor must be applied, by analogy, to aliens as well, in view of the fact that Article 7 of the Universal Declaration of Human Rights provides that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law’.²⁵

In the *Courtroom Note-Taking* case,²⁶ a Grand Bench of the Supreme Court of Japan apparently used article 19(2) of the International Covenant on Civil and Political Rights to read into article 21 of the Constitution of Japan a right to know and a freedom to take notes in courtrooms.²⁷

²⁰ Reply of Japan to List of Issues, UN Doc. CCPR/C/JPN/Q/5/Add.1 (23 September 2008) at 2-3.

²¹ *ibid.* at 2.

²² *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 Supreme Court Reports 313 at 348 (Supreme Court of Canada), per Chief Justice Dickson, unanimously affirmed by the Supreme Court of Canada in *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 80; HRC General Comment No. 31, *supra* note 1 at para. 15; Iwasawa, *supra* note 8 at 83-89.

²³ Fourth Periodic Report of Japan, UN Doc. CCPR/C/115/Add.3 (1 October 1997) at para. 11.

²⁴ (adopted 10 December 1948) UNGA Res 217 A(III).

²⁵ Judgt 18 Nov. 1964, Sup. Ct, 18 KEISHŪ 579, 582, reproduced in Iwasawa, *supra* note 8 at 85.

²⁶ *Supra* note 11.

²⁷ Iwasawa, *supra* note 8 at 86-87.

Issue 2: Freedom of Expression as a Defence to Criminal Prosecution or a Mitigating Factor in Sentencing

A) Freedom of Expression in International Human Rights Law

Article 19 of the Universal Declaration of Human Rights provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁸

Article 29(2) of the Universal Declaration of Human Rights permits restrictions on freedom of expression under the following conditions:

Everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The scope of freedom of expression in articles 19 and 29(2) of the Universal Declaration of Human Rights is essentially the same as article 19 of the International Covenant on Civil and Political Rights and article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”).²⁹ Article 10(1) of the European Convention on Human Rights provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Pursuant to article 10(2) of the European Convention on Human Rights, freedom of expression

may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

B) Legal Value of Judgments of Foreign and International Courts

The jurisprudence of foreign and international courts, including the European Court of Human Rights under article 10 of the European Convention on Human

²⁸ (adopted 10 December 1948) UNGA Res 217 A(III).

²⁹ (adopted 4 November 1950, entered into force 3 September 1953), as amended, European Treaty Series No. 5, 213 UNTS 222.

Rights, is persuasive legal authority for an interpretation of articles 19(2)-(3) in the International Covenant on Civil and Political Rights by the Human Rights Committee and, therefore, the District Court of Aomori.³⁰

There are communications submitted under the Optional Protocol³¹ to the International Covenant on Civil and Political Rights alleging a violation of article 19 of the International Covenant on Civil and Political Rights in which the author³² of the communication or the responding State Party³³ has successfully invoked the jurisprudence of the European Court of Human Rights before the Human Rights Committee. Furthermore, the Human Rights Committee shows “careful regard”³⁴ to pertinent jurisprudence of the European Court of Human Rights even when interpreting the obligations of a State Party to the International Covenant on Civil and Political Rights who is not also a High Contracting Party to the European Convention on Human Rights, such as Japan.

In 1994, the Osaka High Court confirmed the legal value of foreign and international jurisprudence when interpreting the International Covenant on Civil and Political Rights:

‘General Comments’ and ‘views’ [or jurisprudence of the Human Rights Committee] should be relied upon as supplementary means of interpretation of the ICCPR [International Covenant on Civil and Political Rights]. Furthermore, contents of an international convention of a similar kind such as the European Convention on Human Rights and jurisprudence under it can also be treated as supplementary means of interpretation of the ICCPR.³⁵

In concluding “there was room to suspect” that the fingerprinting required for resident aliens in Japan, insofar as it applied to Koreans and Taiwanese in Japan, violated articles 7 (prohibition of degrading treatment) and 26 (non-discrimination) of the International Covenant on Civil and Political Rights, the Osaka High Court “liberally” referred to General Comments and Views of the Human Rights Committee, a report of the European Commission on Human Rights, and a judgment of the European Court of Human Rights.³⁶

C) Case of Mr. Junichi Sato and Mr. Toru Suzuki

As a general rule, Mr. Sato and Mr. Suzuki cannot be released from their duty to obey the criminal law of Japan on the basis that article 19(2) of the International Covenant on Civil and Political Rights affords them protection. However, there is authority from the European Court of Human Rights³⁷ that, in certain circumstances,

³⁰ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), 39 American Journal of International Law Supp. 215 (1945) at art. 38(1)(d); Iwasawa, *supra* note 8 at 83-89.

³¹ *Supra* note 7.

³² *Bodrozic v. Serbia and Montenegro*, United Nations Human Rights Committee, UN Doc. CCPR/C/85/D/1180/2003 (23 January 2006) at paras. 3.1 and 8.

³³ *Lovell v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/80/D/920/2000 (13 May 2004) at paras. 4.25, 10; *Faurisson v. France*, United Nations Human Rights Committee, UN Doc. CCPR/C/58/D/550/1993 (16 December 1996) at paras. 7.4, 7.12-7.13, 10.

³⁴ *Kindler v. Canada*, United Nations Human Rights Committee, UN Doc. CCPR/C/48/D/470/1991 (11 November 1993) at para. 15.3.

³⁵ *Supra* note 9.

³⁶ As discussed in Iwasawa, *supra* note 8 at 119.

³⁷ For example: *Fressoz and Roire v. France (Judgment)*, Grand Chamber of the European Court of Human Rights (Unanimous, violation of art. 10), Application no. 29183/95 (21 January 1999); *Dupuis, et al. v. France (Judgment)*, Chamber of the European

the duty of a journalist or campaigner to gather and impart information to the public may override other duties and responsibilities, such as the duty to obey criminal law.

In determining whether the convictions of the accused in the present case would qualify as necessary restrictions on their freedom of expression within the meaning of article 19(3) of the International Covenant on Civil and Political Rights, this body of jurisprudence from the European Court of Human Rights recommends that the District Court of Aomori weigh the following factors:

- i. Whether the chief intention of the accused in gathering the whale meat was to impart information of a general interest to the public;
- ii. Whether the accused had a reasonable expectation that the imparting of information to the public regarding the gathered whale meat would contribute to a public debate on a matter of general interest;
- iii. Whether one of the purposes in gathering the whale meat and imparting information about it to the public was to constructively criticise the conduct of Japanese public authorities and those through whom public authority is mediated in Japan. In the Human Rights Committee's most recent Concluding Observations to Japan, the Committee observed that journalists and campaigners in Japan may not have enough freedom to constructively and effectively criticize the government;³⁸
- iv. Whether one of the purposes in gathering the whale meat and imparting information about it to the public was to expose an allegedly illegal activity;
- v. Whether the accused reasonably believed that the timing of the gathering of the whale meat was necessary;
- vi. Whether, in gathering the whale meat, the accused acted in good faith by not intending to harm anyone or anything but rather to contribute to the more general debate on a topic that interested the public;
- vii. Whether the accused, in gathering the whale meat, posed a threat or otherwise caused harm to the life or physical or mental integrity of anyone or anything;
- viii. Whether the accused had a reasonable basis to believe that the package contained embezzled whale meat;
- ix. Whether the gathered whale meat was relevant to the subject matter and credibility of the information ultimately imparted by Greenpeace Japan to the Japanese and international public regarding allegedly embezzled whale meat in Japan;
- x. Whether there is a private or public interest in conflict with the public's interest in receiving information about allegedly embezzled whale meat in Japan;
- xi. Whether there were practical alternative, legal avenues of investigation available to the accused to gather the whale meat;

Court of Human Rights (Unanimous, violation of art. 10), Application no. 1914/02 (12 November 2007); *Stoll v. Switzerland (Judgment)*, Grand Chamber of the European Court of Human Rights (twelve votes to five, no violation of art. 10), Application no. 69698/01 (10 December 2007).

³⁸ *Supra* note 14 (18 December 2008) at para. 26.

- xii. Whether in gathering the whale meat and imparting information about it to the public the accused intended to function and did actually function as public ‘watchdogs’;
- xiii. Whether the conviction of Mr. Sato or Mr. Suzuki might discourage journalists and campaigners in Japan from gathering and imparting important information to the Japanese public; and
- xiv. Whether the conviction of Mr. Sato or Mr. Suzuki might discourage journalists and campaigners in Japan from functioning as public ‘watchdogs.’

In its Fifth Periodic Report to the Human Rights Committee under article 40 of the International Covenant on Civil and Political Rights, the Government of Japan provides the following summary of a judgment of the Grand Bench of the Supreme Court of Japan passed on 11 June 1986 which seems consistent with the above list of relevant factors:

[C]riminal or civil acts that...concern facts that are of public interest are not illegal where the objective of the acts is exclusively in the public’s interest and there is proof that the facts in question are true. Even if there is no proof that the facts are true, if the person who committed the acts had sufficient reason to believe that the facts were true, the acts should be regarded as non-intentional and non-negligent.³⁹

D) Application of Law to Present Case

Based on the information about the present case provided to me by Greenpeace Japan, including translated copies of the depositions of Mr. Sato and Mr. Suzuki submitted to the Tokyo District Public Prosecutor’s Office and dated the 26th of May 2008, I understand that Mr. Sato and Mr. Suzuki have been charged under the Penal Code of Japan with unlawful entry and larceny on the basis of alleged acts that took place on 15 April 2008. My understanding of the events that took place prior to and after these alleged acts on 15 April 2008 is also based on the information provided to me by Greenpeace Japan, including the depositions of the two accused. I also understand that, at all times material to the present case, Mr. Sato and Mr. Suzuki were acting in their professional capacities as the Ocean Ecology Campaign Senior Manager and Action Consultant, respectively, for Greenpeace Japan. On the basis of this information, and in consideration of the above list of relevant factors, I am satisfied that the freedom of expression of Mr. Sato and Mr. Suzuki is a relevant legal issue in their criminal trials. If these factors are weighed by the District Court of Aomori in favour of Mr. Sato and Mr. Suzuki, then they should be found not guilty of the charges against them.

E) Possible Sentences of Mr. Sato and Mr. Suzuki

For Japan to give full effect to freedom of expression under article 19 of the International Covenant on Civil and Political Rights, any sentence imposed by the District Court of Aomori on either of the accused in the present case must also be necessary to achieve one of the legitimate purposes enumerated in articles 19(3)(a)-(b)

³⁹ Fifth Periodic Report of Japan, UN Doc. CCPR/C/JPN/5 (25 April 2007) at para. 14.

of the International Covenant on Civil and Political Rights. If there is a sentence imposed, its relative severity will have to be weighed against the importance of protecting freedom of expression, and, in particular, the freedom of journalists and campaigners in Japan to serve and protect the public interest.⁴⁰

However, a minor sentence does not mean that the conviction is a permissible restriction on freedom of expression. In *Fressoz and Roire v. France*,⁴¹ a unanimous Grand Chamber of the European Court of Human Rights found that France had violated the right to freedom of expression by convicting the two journalists in question. The Grand Chamber reached this conclusion notwithstanding the fact that the Paris Court of Appeal apparently placed some importance on the journalists' freedom of expression by sentencing Mr. Fressoz and Mr. Roire with fines instead of imprisonment, and despite the fact that the amount of Mr. Roire's fine was half (FRF 5000) the statutory minimum (FRF 10 000) that Mr. Fressoz received.⁴²

Conclusions

Based on the information about the present case provided to me by Greenpeace Japan, the freedom of expression of Mr. Junichi Sato and Mr. Toru Suzuki is a relevant legal issue in their criminal trials. Articles 19(2)-(3) of the International Covenant on Civil and Political Rights, which oblige Japan to respect, protect, and fulfil the freedom of expression of Mr. Sato and Mr. Suzuki, directly apply to the present litigation before the District Court of Aomori. The jurisprudence of foreign and international courts, including the European Court of Human Rights, is a useful and persuasive source of international human rights law to assist the District Court of Aomori in faithfully observing Japan's treaty obligations under articles 19(2)-(3) of the International Covenant on Civil and Political Rights and articles 21 and 98(2) of the Constitution of Japan.

There is a general rule in international human rights law that a journalist or campaigner cannot be released from his or her duty to obey domestic criminal law on the basis that article 19 of the International Covenant on Civil and Political Rights affords him or her protection. However, there is authority from the Supreme Court of Japan and the European Court of Human Rights that there are exceptions to this rule. According to this jurisprudence, in determining whether the conviction or sentence of either of the accused in the present case would constitute a necessary restriction on his freedom of expression within the meaning of article 19(3) of the International Covenant on Civil and Political Rights, the District Court of Aomori should analyse the complete factual record in light of the factors identified above in order to properly balance the interests involved. If these factors are weighed by the District Court of Aomori in favour of Mr. Sato and Mr. Suzuki, then they should be found not guilty of the charges against them, or, in the alternative, minor sentences should be imposed.

⁴⁰ *Stoll v. Switzerland*, *supra* note 37 at paras. 153-54.

⁴¹ *Supra* note 37.

⁴² *ibid.* at paras. 22, 27.