



Japan: WWII POW and Forced Labor Compensation Cases

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JAPAN

WWII POW AND FORCED LABOR COMPENSATION CASES

Executive Summary

Japanese courts have been dealing with post-WWII compensation cases from foreigners since approximately 1990. In the cases of POWs, forced laborers, and comfort women, some lower courts have awarded compensation, but most of them have not. There are many legal obstacles for plaintiffs in such cases. In 2007, the Supreme Court decided the fate of most of these cases. This article provides background, including an introduction to the post-WWII peace treaty scheme, legal theories, and cases.

I. Introduction

Since the end of the Second World War (WWII), many people have filed lawsuits against the state and/or private parties in Japan, seeking compensation based on suffering as the result of wartime wrongs (hereinafter, “post-WWII compensation cases”). As of February 2006, about one hundred judgments had been rendered by district, high, and supreme courts. Among them, twenty-five were by the Supreme Court.¹

The nature of post-WWII compensation cases can be roughly categorized by time period. First, from the 1950s to the 1980s, some Japanese nationals filed lawsuits against the Japanese government seeking compensation for loss of family, bodily injuries, and lost assets that the plaintiffs would have been able to demand from the Allied Countries if their claims had not been waived by the San Francisco Peace Treaty.² Then, from the 1970s to the 1990s, Taiwanese and Korean former Japanese military employees who lived in Japan sued the Japanese government for welfare benefits. There were agreements between Japan and Taiwan or Korea concerning welfare benefits for former military personnel. Those who lived outside their countries could not receive welfare benefits from their own government.³ Finally, around 1990, various foreigners started to sue the Japanese government.⁴ In 1991, comfort women⁵ demanded compensation and

¹ Masahiro Igarashi, *Nihon no “senjo hoshō saiban” to kokusai hō* [“Post-war compensation cases” in Japan and international law], 105-1 KOKUSAIHŌ GAIKŌ ZASSHI 1, 12 (2006).

² Masahiko Asada, *Nihon ni okeru senjo hoshō saiban to kokusai hō* [Post-war compensation cases and international law in Japan], 1321 JURISUTO 26, 27 (2006).

³ *Id.*

⁴ *Id.*

an official apology.⁶ More recently, foreigners who were forced to work added private companies as defendants.

The prisoner of war (POW) and forced labor compensation cases discussed in this article are a part of these post-WWII compensation cases.⁷ In these cases, if a plaintiff sues the Japanese government in tort, for a breach of labor contract, or for a violation of the obligation to provide security for workers as an employer, the plaintiff must deal with many legal obstacles to be awarded damages, including: sovereign immunity; statutes of limitations; and waiver of claims under the San Francisco Peace Treaty. Many forced laborers and comfort women have sued the government and dealt with these issues. When they sue the government based on international law, questions of sovereign immunity and statutes of limitations may not apply, but the Peace Treaty still matters and a new question is added: whether an individual can claim compensation directly against the state, not through the government of the state to which the claimants belong, for suffering during wartime. The first western POW case was filed in 1994 in Japan. In this case, Dutch POWs and civilian internees sued the Japanese government, seeking damages for their suffering while they were detained by the Japanese military in East Indochina during WWII. In 1995, POWs or internees from the United Kingdom, the United States, the Netherlands, and others in Southeast Asia sued the Japanese government. In these two cases, the plaintiffs' claims were based on international law.

It would be interesting to see the other side of POW suits in Japan. Japanese internees have also sued their own government concerning its war responsibilities. In 1981, Japanese internees sued the Japanese government to seek compensation for suffering and labor while they were detained in the former Soviet Union in the late 1940s. This case dealt with the Third Geneva Convention of 1949, international customary law, and compensation under the Japanese Constitution, especially compensation for private property taken for public use.

This article introduces legal theories that were discussed in Japanese courts in POW or forced labor compensation cases, and some other relevant cases.

⁵ The so-called “wartime comfort women” were those who were taken to former Japanese military installations, such as comfort stations, for a certain period during wartime in the past and forced to provide sexual services to officers and soldiers. Asian Women’s Fund, *Who were the Comfort Women?-Who were the Comfort Women?*, <http://www.awf.or.jp/e1/facts-00.html> (last visited Sept. 21, 2008).

⁶ Igarashi, *supra* note 1, at 3.

⁷ Post-WWII compensation cases include additional types of cases. For example, Korean A-bomb survivors demanded benefits based on the domestic law of Japan. Class B and C Korean war criminals sued the Japanese government. As one case briefly introduced in section IV (Statute of Limitations) illustrates, Chinese people who were injured by poison gas weapons left in China by the Japanese Imperial Army at the end of WWII also sued Japan. Japanese women and children who lived in Northeast China at the end of WWII and could not come back to Japan for decades sued the government because it had not given them necessary support.

II. Existence of Abuse Was Not Central to Disputes

In many post-WWII compensation cases, the existence of abuse against POWs, comfort women, and forced laborers was not confirmed, but not disputed by the Japanese government. Under Japanese civil procedure, a defendant may answer to the facts presented by a plaintiff in one of three ways: admit the facts, deny the facts, or claim that they “do not know” whether the facts are true. If a party does not clarify his intention to dispute the facts presented by the opposing party, he is regarded as having approved the facts, unless it is understood that the party disputes the facts indirectly.⁸

In many post-WWII compensation cases, the government does not show its position concerning the facts presented by plaintiffs. Instead, it asserts that the plaintiffs’ claims are baseless, e.g., because the plaintiffs are seeking compensation for claims that are obviously precluded by sovereign immunity, and that the claims must, therefore, be dismissed even before the facts are examined.⁹ Some courts have dismissed cases without examining the facts. When courts decide the facts, it appears that courts regarded that the government indirectly disputes facts because it is clear from the circumstances that it does not approve of the facts. Unless the defendant admits the facts, the plaintiff must prove those facts. In many cases, courts have admitted large parts of facts, especially the personal experiences of abuse that plaintiffs suffered, and which they asserted and proved, because the government did not substantially dispute them.¹⁰ The Japanese government disputes facts concerning the military or civil service systems if those facts are different from their records. The Japanese government does not have a system for investigating incidents in the past to defend cases, however. Such investigations are undertaken only in the government attorneys’ preparation for submitting documents to the courts. However, after a resolution that called on the Japanese government to formally acknowledge and apologize for comfort women was introduced in the United States House of Representative on January 31, 2007,¹¹ the government started to reconsider its tactics in court. Japanese representatives and the government think some courts admitted facts presented by plaintiffs that were not true because the government did not dispute them in the court procedures.¹²

⁸ Minji soshō hō [Civil Procedure Code], Law No. 109 of 1996, *as amended*, art. 159, para. 1.

⁹ Takashi Ohtake’s answer to Tomomi Inada’s question, *Yosan iinkai giroku* [Budget Committee Minutes] No. 11, No. 166th Diet Session, House of Representative, 3 (Feb. 19, 2007). As Honorable Inada stated subsequently, it is an unusual attitude in courts in Japan. Attorneys hired by private parties would always dispute the facts if they do not admit them.

¹⁰ Sometimes, plaintiffs take it personally. For example, a member of a support group of Chinese forced laborers wrote on the group’s website that the defendants, the state and certain companies, “took an insincere attitude that they did not have to answer to the facts asserted.” Niigata no kinkyō [Recent State in Niigata], Feb. 10, 2000, http://blog.livedoor.jp/suopei/archives/cat_621709.html (translated by the author).

¹¹ H. Res. 121, 110th Congress (adopted by the House on July 30, 2007).

¹² Tomomi Inada’s statement, *supra* note 9; *see also* Seifu-jimin kōno danwa no shūsei mosaku [Government and Liberal Democratic Party grope for amendment of Kōno statement], *SANKEI NEWSPAPER*, Feb. 22, 2007 (on file with author).

Concerning the historical background of forced laborers and comfort women, the following facts are commonly recognized.

A. Forced Laborers

As the military conflicts between China and Japan that began in 1931 became prolonged and combat areas spread in China, securing energy resources, such as coal, became extremely important for Japan. In 1938, Japan enacted the Nation Mobilization Law.¹³ This law enabled the Japanese government to control the economy and citizens' lives without approval of the Diet (Japanese Parliament). In 1939, the Citizen Draft Order was issued.¹⁴ Based on this order, civilians were drafted as workers in the war industry. Soon thereafter, Koreans who became Japanese nationals when Korea was annexed to Japan in 1910 were included in the system. Koreans were taken to the Japanese archipelago from the Korean peninsula. After the Pacific War started in early 1942, more Koreans were taken to the Japanese archipelago. As Japan needed more workers for industries that required hard labor, in late 1942 Japan decided to start a test program to bring 1,000 Chinese nationals to Japan and have them engage in hard labor. In late 1943, Japan decided to bring even more Chinese from the continent.¹⁵

B. Comfort Women

There have been arguments concerning how much the Japanese government was involved in the comfort women system. The Japanese government conducted a fact-finding study and released a report in August 1993, titled *Regarding So-called Comfort Women*.¹⁶ In the report, the Japanese government recognized that: (1) the Japanese military requested the establishment of the comfort stations; (2) many comfort stations were run by civilians, but in some cases the Japanese military directly ran them; (3) when the comfort stations were run by civilians, the Japanese military was directly involved in their business, i.e., authorization for the establishments, setting prices and rules, and managing prevention and treatment of sexually transmitted diseases; (4) recruitments were usually done through contractor procurers, but as combat areas expanded and it became difficult to recruit enough women, procurers recruited them by deception or under threat, in some cases with the support of Japanese authorities; and (5) the transportation of comfort women was supported by the Japanese military.¹⁷ In post-

¹³ Kokka sōdōin hō [Nation Mobilization Law], Law No. 55 of 1938.

¹⁴ Kokumin chōyō rei [Citizen Draft Order], Imperial Order No. 451 of 1939.

¹⁵ Information in this paragraph is from the first instance of the Deserter in Hokkaido Case, 1067 HANREI TAIMUZU 119, 123 (Tokyo Dist. Ct., July 12, 2001); the first instance of the Fukuoka Forced Labor Case, 1809 HANREI JIHŌ 111, 112-3 (Fukuoka Dist. Ct., Apr. 26, 2002); the Chinese Forced Labor Case, (Tokyo Dist. Ct. Mar. 11, 2003), available at <http://www.courts.go.jp/hanrei/pdf/5F00C5448B78E5A949256CF70016BBCB.pdf>; and the Nishimatsu Construction Company Forced Labor Case, 61-3 MINSHŪ 1188 (S. Ct. Apr. 27, 2007).

¹⁶ Ministry of Foreign Affairs of Japan, Recent Policy of The Government of Japan on The Issue Known as “Comfort Women” (April 2007), available at <http://www.mofa.go.jp/policy/women/fund/policy.html>.

¹⁷ See Naikaku kanbo naikaku gaisei shingi shitsu [Cabinet Foreign Policy Room, Cabinet Secretariat], Iwayuru Jūgun ianfu mondai nit suite [Regarding So-called Comfort Women] (Aug. 4, 1993), available at http://www.mofa.go.jp/mofaj/area/taisen/pdfs/im_050804.pdf.

WWII compensation cases, many plaintiffs claimed that they were taken to comfort stations by deception or by force.¹⁸

In some popular case names, the phrase “comfort women” is used, but in fact, the women were not comfort women in comfort stations, rather, they were simply repeated rape victims. Professor Myongsuk Yun classified victims of sexual violence by the Japanese military during WWII into three categories: comfort women, repeated rape victims in certain places, and random rape victims.¹⁹ Professor Haruyuki Yamate also commented that the popular case name “Philippine comfort women case” is wrong because the plaintiffs identified themselves as confined rape victims, not comfort women who were forced to engage in sexual slavery in exchange for money.²⁰

III. Sovereign Immunity

When an individual sues a state under the state’s jurisdiction, the doctrine of sovereign immunity may prevent it. That doctrine provides that an individual cannot sue the government or its political subdivision without its consent.²¹ This doctrine is commonly observed throughout the world. This was an absolute doctrine historically that held governments immune from tort liability arising from the activities of government.²² Recently, however, many jurisdictions have applied sovereign immunity in different degrees, depending on the circumstances.²³

Until Japan enacted the State Torts Liability Law in 1947,²⁴ it was understood that the state could not be sued and held liable in tort actions. Unlike the pre-WWII Imperial Constitution, the post-WWII Constitution established a new rule. Its Article 17 states: “Every person may sue for redress as provided by law from the State or a public entity, in case he has

¹⁸ The second instance of Tokyo Korean Comfort Women and Others Case, 1843 HANREI JIHŌ 32, 48 and 62 (Tokyo High Ct., July 22, 2003); the first instance of so-called Kankama moto ianfu soshō [Kankama Former Comfort Women Case], 1642 HANREI JIHŌ 24, 28-30 (Yamaguchi Dist. Ct., Shimonoseki Branch April 27, 1998); and the first instance of Dutch POW Case, 1685 HANREI JIHŌ 19, 23 (Tokyo Dist. Ct. Oct. Nov. 30, 1998).

¹⁹ MYONGSUK YUN, NIHON NO GUNTAI IANJO SEIDO TO CHŌSENJIN GUNTAI IANFU [JAPANESE COMFORT STATION SYSTEM AND KOREAN COMFORT WOMEN] 13-14 (2003).

²⁰ Haruyuki Yamate, Senmon enshū shiryō [Seminar materials] No. 2, (9), Chū [note] 1, http://page.freett.com/haruyamate/new_page_3-2.htm (last visited Sept. 26, 2008). Professor Yamate is an expert on international law, especially in the area of post-WWII compensation cases. His website lists recent legal news and court decisions regarding such cases.

²¹ *Sovereign Immunity*, WEX (Legal Information Inst., Cornell Univ. Law School), http://topics.law.cornell.edu/wex/Sovereign_immunity (last visited Sept. 19, 2008).

²² See WEX, *supra* note 21.

²³ NISHINO AKIRA, KOKKA BAISHŌ HŌ [STATE TORT LIABILITY LAW] 15-16 (Itsuo Sonobe ed., 1997).

²⁴ Kokka baishō hō [State Torts Liability Law], Law No. 125 of 1947.

suffered damage through the illegal act of any public official.”²⁵ The State Tort Liability Law implemented this provision. Wrongdoings during WWII, however, occurred before the enactment of the Law and the Law does not apply retroactively. Annexed Provision 6 of the State Torts Liability Law provides, “damages, which were caused by an act that occurred before the enforcement of the law shall follow the precedent.”²⁶ This means that the state’s tort liability stemming from its conduct during WWII cannot be pursued in Japanese courts. In 1950, the Supreme Court confirmed this.²⁷ In that case, a police officer destroyed a building because the owner did not demolish it despite his obligation to do so. The police officer’s act was illegal. The Supreme Court dismissed the appeal from the owner based on sovereign immunity, stating, “there is no reason the state is responsible for this destructive act because, as stated by the high court judgment, the civil code was not applied to the exercise of state power, and, under the old Constitution, there was no law that recognized the state’s responsibility to pay damages.”²⁸ In most torts cases against the state in Japan, courts have followed this Supreme Court judgment and denied liability.

In recent post-WWII reparations cases, however, some courts did not apply sovereign immunity. In early 2003, the Tokyo District Court and the Kyoto District Court rendered judgments that did not apply sovereign immunity in cases where Chinese forced laborers claimed damages against the state.²⁹ Following these district courts judgments, two High Courts did the same in two different cases from the district courts. The judgments reflect the understanding that the pre-WWII sovereign immunity doctrine was not absolute.

Among two high court cases, the Tokyo High Court case involved Korean military employees and comfort women who sought damages against the state.³⁰ One of the legal bases of the plaintiffs’ claims was torts. In July 2003, the Tokyo High Court stated that even before the enactment of the State Torts Liability Law, some tort provisions in the Civil Code could be applied to the state.³¹ Article 715 of the Civil Code (employer tort liability) did not literally

²⁵ NIHONKOKU KENPŌ [CONSTITUTION OF JAPAN], art. 17 (1946). The English translation is available on Prime Minister of Japan and His Cabinet’s website, at http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last visited Sept. 19, 2008).

²⁶ State Torts Liability Law, Law No. 125 of 1947, Annexed Provision art. 6 (translated by the author).

²⁷ Katsumi Matsumoto, “*Kokka mitōseki no hōri*” to minpōten [*“State Immunity judicial doctrine” and Civil Code*], 2003-6 (292) RITSUMEIKAN HŌGAKU 317, 320 (2003), citing 3 SHŪMIN 225 (S. Ct. Apr. 11, 1950).

²⁸ *Id.* (translated by the author).

²⁹ Ōeyama Nikkel Mine Case, 1822 HANREI JIHŌ 83 (Kyoto Dist. Ct., Jan. 15, 2003); Second Tokyo Chinese Forced Labor Case (Tokyo Dist. Ct., Mar. 11, 2003), available at <http://www.courts.go.jp/hanrei/pdf/5F00C5448B78E5A949256CF70016BBCB.pdf>.

³⁰ This is the first case in which Korean comfort women sued Japan in 1991. Because the plaintiffs included many forced laborers and comfort women, and because the plaintiffs relied on many alternative legal theories, it took ten years for the first instance decision to be rendered. The first instance decision was rendered on March 26, 2001, by the Tokyo District Court. The Tokyo District Court judgment was not published.

³¹ The second instance of Tokyo Korean Comfort Women and Others Case, 1843 HANREI JIHŌ at 63.

exclude the state from employer tort liability, the court said. People could not sue the state because of procedural problems created by the pre-war administrative and civil procedure laws. Under the post-war Constitution and the new Court Organization Law, it is hard to see the reason or rational to maintain the sovereign immunity doctrine, the court said.³² (The claims based on tort and other theories were all rejected in the end, however, because of the Treaty on Economic Cooperation and Settlement of Issues Regarding Properties and Claims Between Japan and the Republic of Korea,³³ and special legislation³⁴ based on the Treaty that terminated all claims against each state and the parties.³⁵ Peace treaty issues are discussed later in this article.)

In the other high court case, decided in 2004, the Fukuoka High Court also did not apply the doctrine of sovereign immunity in a case involving Chinese civilians who sought damages against the state and mining companies based on torts.³⁶ The plaintiffs were forced to go to Japan and forced to work under severe conditions near the end of WWII. The Fukuoka High Court noted that the Supreme Court, under the old Constitution, at first exempted the state from tort liability for all kinds of public servants' acts. The High Court found, however, that the Supreme Court applied tort provisions of the Civil Code to acts which were not an exercise of the state's authority in a decision rendered in 1916.³⁷ In the 1916 Play Ground Facility case, the Supreme Court made the state liable for the death of a school child that was caused by malfunctioning school playground equipment.³⁸ The Fukuoka High Court stated that, even under pre-war judicial precedents, the sovereign immunity doctrine was not an absolute doctrine. There was room to restrict the application of the doctrine to acts of the state's exercise of its authority in very special situations.³⁹ The Fukuoka High Court found that such a situation existed in the case before it, where the plaintiffs were forced to leave their normal civilian life and be apart from their families, where it was hard to see the states' respect for individuals given the conditions of transportation from China to Japan, and where the work environment of the

³² *Id.*

³³ The Treaty on Economic Cooperation and Settlement of Issues Regarding Properties and Claims Between Japan and the Republic of Korea, June 22, 1965, Treaty No. 27 of 1965 (Japan).

³⁴ Zaisan oyobi seikyūken ni kansuru mondai no kanketsu narabini keizai kyōryoku ni kansuru nihonkoku to daikanminkoku tono aida no kyōtei dai ni jō no jisshi ni tomonau daikanminkoku tō no zaisanken ni taisuru sochi ni kansuru hōritsu [Law Concerning Measures for Property Rights of Republic of Korea and Others Accompanied by Implementation of Article 2 of The Treaty on Economic Cooperation and Settlement of Issues Regarding Properties and Claims Between Japan and the Republic of Korea] (Daikanminkoku tō no zaisanken ni taisuru sochi ni kansuru hōritsu [Law Concerning Measures for Property Rights of Republic of Korea and Others]), Law No. 144 of 1965.

³⁵ The second instance of Tokyo Korean Comfort Women and Others Case, 1843 HANREI JIHŌ 32 .

³⁶ The second instance of the First Fukuoka Forced Labor Case, 1875 HANREI JIHŌ 62 (Fukuoka High Ct., May 24, 2004).

³⁷ *Id.* at 101.

³⁸ Yūdō enbō [Playground equipment] case, 22 TAIHAN MINROKU 1088 (S. Ct., June 1, 1916).

³⁹ The second instance of the First Fukuoka Forced Labor Case, 1875 HANREI JIHŌ at 101 .

mining companies that they encountered upon their arrival was so severe.⁴⁰ Being mindful that whether the state's acts were illegal or against public order should be decided under the laws and public order that existed at the time of the act, the court said forced transportation and labor in the plaintiffs' case were against law and public order under the old Constitution.⁴¹ The court therefore concluded that application of sovereign immunity was unfair. (The Fukuoka High Court dismissed the plaintiffs' claims in the end, however, on statute of limitations grounds.⁴²)

The appeal of the Tokyo High Court decision was rejected by the Supreme Court on November 29, 2004.⁴³ The Supreme Court did not mention the sovereign immunity issue. Other lower courts have not followed the 2003 Tokyo High Court and the 2004 Fukuoka High Court decisions with regard to sovereign immunity.⁴⁴ In 2006, the Nagano District Court dismissed former Chinese forced laborers' claims against the state based on sovereign immunity, among other things.⁴⁵ The appeal of the Fukuoka High Court decision was also rejected by the Supreme Court on April 27, 2007.⁴⁶ Because the case involved many legal issues, it is unknown whether the Supreme Court rejected the High Court's understanding of sovereign immunity.

IV. Statute of Limitations

The statute of limitations for a tort claim is three years from the time that the victim learns of the damages and identity of the aggressor, and twenty years from the time when the tort was committed, pursuant to Article 724 of the Civil Code, which provides:

The right to demand compensation for the damage which has arisen from an unlawful act shall lapse by prescription if not exercised within three years from the time when the injured party or his legal representative became aware of such damage and of the identity of the person who caused it, the same shall apply if twenty years have elapsed from the time when the unlawful act was committed.⁴⁷

⁴⁰ *Id.*

⁴¹ *Id.* at 102.

⁴² *Id.* at 109.

⁴³ The third instance of Tokyo Korean Comfort Women and Others Case (Sp. Ct. 2nd petit bench, Nov. 29, 2004), available on Courts in Japan's website, at <http://www.courts.go.jp/hanrei/pdf/5196ACF0F348874649256F5B002686F7.pdf>.

⁴⁴ Reporter's Commentary, Nagano Chinese Forced Laborers Case, 1931 HANREI JIHŌ 109, 110 (Nagano Dist. Ct., Mar. 10, 2006).

⁴⁵ Nagano Chinese Forced Laborers Case, *id.* at 123-28.

⁴⁶ *Chūgoku jin ga okoshita 4 ken no sengo hoshō soshō, saikōsai ga seikyū kikyaku* [Supreme Court Rejected Four War Compensation Cases Filed by Chinese], YOMIURI ONLINE, Apr. 27, 2007 (on file with author).

⁴⁷ Minpō [Civil Code], Law No. 89 of 1896, *as amended*, art. 724. The translation is from Eibun Horei Sha, *The Civil Code of Japan 2005*, EHS LAW BULLETIN SERIES, Vol. II, FA-FAA (2005).

Japan surrendered in 1945, more than sixty years ago. If the term of the statute of limitations could not be disrupted, all claims would have expired long ago. The nature of this twenty-year term has been discussed among scholars. Some think the twenty-year term may be disrupted. The Supreme Court made this clear in 1989 in a case where a tort victim sought damages based on the State Tort Liability Law after twenty-eight years from the time of the accident.⁴⁸ The victim had received compensation and welfare grants from the state to some extent.⁴⁹ The Court stated that it did not make sense that Article 724 of the Civil Code would prescribe an identical type of statute of limitations in one article in different lengths while the article intends to settle tort claims speedily.⁵⁰ The Court concluded that a victim's awareness of damages and the identity of the tort-feasor affect the three-year term, but that the twenty-year limitation is uniformly applied with or without the victim's awareness.⁵¹ Most of the war-time tort cases were dismissed because of the statute of limitations under this reasoning.

However, in 1998, the Supreme Court found an exception to this uniform twenty-year term. In the 1998 case, a person who became paralyzed and mentally retarded because of a vaccination provided by the municipal government as required by the national vaccine law did not have a legal representative when the statute of limitations ran out.⁵² The Supreme Court compared Articles 158 and 724 of the Civil Code. Article 158 of the Civil Code extends the term of a statute of limitations by six months when a minor or legally incompetent person does not have a legal representative during the final six months of the term. Article 158 cannot be applied to the twenty-year statute of limitations of Article 724 because it extends only the term of a statute of limitations that can be disrupted. The Supreme Court analyzed the purpose of the article. When a legally incompetent person does not have a legal representative, he cannot disrupt the statute of limitations; therefore, Article 158 aims to protect him.⁵³ It is too harsh for a legally incompetent person to let the statute of limitations run out when he is without legal representation, the Supreme Court said. The Court applied the spirit of Article 158 to the case. The Court found that it is extremely unfair for a tort victim who is legally incompetent because of the tort, and who does not have a legal representative during the final six months of the twenty-year statute of limitations period, to be barred by the statute of limitations only because of the passage of twenty years. While the victim cannot act in such cases, the aggressor is exempted from liability.⁵⁴ The Supreme Court concluded that, in such a case, if a newly

⁴⁸ 43-12 MINSHŪ 2209 (S. Ct. 1st petit bench, Dec. 21, 1989).

⁴⁹ *Id.* at 2211.

⁵⁰ *Id.* at 2213.

⁵¹ *Id.*

⁵² 52-4 MINSHŪ 1087 (S. Ct., June 12, 1998).

⁵³ *Id.* at 1091.

⁵⁴ *Id.*

appointed legal representative files a lawsuit within six months from his appointment, the twenty-year statute of limitations period of Article 724 does not apply.⁵⁵

Although the Supreme Court found an exception to the twenty-year statute of limitations of Article 724 in very special conditions, some legal practitioners saw a chance to find more exceptions if there were comparable special conditions. Plaintiffs of post-WWII compensation cases thought similar exceptional conditions should apply in their favor. Among post-war compensation cases, the Tokyo District Court, for the first time, ruled that it was extremely unfair to apply this twenty-year statute of limitations in the 2001 Deserter in Hokkaido case.⁵⁶ In this case, a Chinese man, Lianren Liu, who was forced to go to Japan and work under extremely harsh conditions at a coal mine in Hokkaido near the end of WWII, escaped the mine and hid in the wild for thirteen years even after the war. He sued the Japanese government based on the State Torts Liability Law, alleging that the state negligently did not look for him and protect him.⁵⁷ The Tokyo District Court held in favor of Liu. Regarding the statute of limitations, the court found the following special circumstances: (1) in 1946, the Ministry of Foreign Affairs made a report on Chinese forced laborers; (2) from the report, it was possible to confirm the facts of Liu's case; (3) Liu was found in 1958, and subsequently demanded an apology and payment of damages in public, but outside of the judicial process; (4) when the Foreign Relations Committee of the Diet discussed him in 1958, the government admitted Liu worked at the mine and the existence of the report, but said that it did not know where the report was; and, (5) the report was found at an overseas Chinese association in Tokyo in 1993.⁵⁸ The court found that it was extremely unfair to exempt the government from liability because it did not sincerely search for the report and lost the opportunity to compensate the plaintiff in 1958, and because Liu's suffering was so severe.⁵⁹

The Tokyo High Court reversed the lower court's ruling, however, and applied the statute of limitations in Liu's case.⁶⁰ The High Court agreed that application of the twenty-year statute of limitations of Article 724 could be restricted where special circumstances would make its application extremely unjust and unfair.⁶¹ The High Court did not find such circumstances in Liu's case, however. The High Court found that the reasons Liu could not file a lawsuit on time were unrelated to the Japanese government's negligence that gave rise to Liu's damages, noting

⁵⁵ *Id.* at 1092.

⁵⁶ The first instance of so-called Deserter in Hokkaido Case, 1067 HANREI TAIMUZU at 123 .

⁵⁷ Jian no gaiyō (Summary of the case), *id.* at 123.

⁵⁸ *Id.* at 148-149.

⁵⁹ *Id.* at 149.

⁶⁰ The second instance of Deserter in Hokkaido Case, 1904 HANREI JIHŌ 83 (Tokyo High Ct. June, 23, 2005). The court denied the Chinese forced laborer's claim on other ground, but nonetheless addressed the statute of limitations question.

⁶¹ *Id.* at 109.

that: Japan and the People's Republic China (PRC) did not have a formal diplomatic relationship until 1972 after WWII; ordinary PRC citizens could not obtain passports until 1985; the Chinese government first suggested the possibility of an individual's war reparation claims in 1995;⁶² and a Chinese farmer's average income was too low to afford a lawsuit in Japan.⁶³ Though the Foreign Affairs Ministry's attitude of not searching for the report of WWII Chinese forced laborers was not sincere, the High Court noted that Liu had obtained a copy of a part of the report in 1958. Because the Ministry admitted it had made the report, the Ministry's uncooperative attitude did not affect Liu's ability to sue the Japanese government, the High Court said.⁶⁴ Therefore, though the High Court found Liu's suffering was severe, it did not find special circumstances to prevent the application of the statute of limitations.⁶⁵ The Supreme Court did not take an appeal from Liu's successors.⁶⁶ Because the High Court denied Liu's claim on other grounds than the statute of limitations, it is not clear whether the Supreme Court approved a part of the high court judgment regarding the statute of limitations.

There were two other district court judgments that did not apply the twenty-year statute of limitations of Article 724 of the Civil Code in post-WWII compensation cases. In the Fukuoka forced labor case, the plaintiffs, Chinese forced laborers, sued the state and mining companies that they worked for near the end of WWII.⁶⁷ Similar to the Tokyo District Court in the Hokkaido Deserter case, the Fukuoka District Court examined whether there were special situations that made the application of the twenty-year statute of limitations of Article 724 extremely unfair and unjust. The Tokyo District Court decided that the situation was special, and awarded damages against the mining companies.⁶⁸ This part of the judgment, however, was reversed by the High Court.⁶⁹ The Supreme Court dismissed the plaintiffs' appeals.⁷⁰ The

⁶² Japan's major newspaper, *Asahi*, published an article on March 9, 1995, which reported that a Taiwan delegate told *Asahi* that the Vice Premier of the State Council and then-Minister of Foreign Affairs, Qian Qichen, told the delegate that individuals' claims of war compensation were not waived by the 1972 Joint Communiqué when he answered a question when Taiwan delegates had a meeting with Qian on March 7, 1995, during the National People's Congress. This article was repeatedly cited by Chinese plaintiffs in post-WWII cases. However, when the Japanese government inquired about the statement and asked for a text of the statement, PRC answered that there was no written record of it. Masatoshi Ito's answer and Yutaka Kawashima's Answer, KESSAN IIN KAIGI ROKU [SETTLEMENT COMMITTEE MINUTES] No. 3, 132nd Diet Session, House of Councillors, 32 (Apr. 11, 1995).

⁶³ The second instance of Deserter in Hokkaido Case, 1904 HANREI JIHŌ at 100.

⁶⁴ *Id.* at 111.

⁶⁵ *Id.*

⁶⁶ YOMIURI ONLINE, *supra* note 46.

⁶⁷ The first instance of Fukuoka Forced Labor Case, 1809, HANREI JIHŌ 111.

⁶⁸ *Id.* at 138. The claims for damages against the state were denied because of sovereign immunity. *Id.* at 134-5.

⁶⁹ The second instance of Fukuoka Forced Labor Case, 1875 HANREI JIHŌ at 106 .

⁷⁰ YOMIURI ONLINE, *supra* note 46.

second case is a case in which Chinese were injured by poison gas that the Japanese Imperial Army hid and left in China at the end of WWII.⁷¹ One of the injuries by mustard gas occurred more than twenty years before the plaintiffs filed a lawsuit. The Tokyo District Court decided that it was extremely unjust and unfair to exempt the state from liability by applying the statute of limitations. The court found no justification for the state's nonfeasance and found justification for the plaintiffs' failure to file an action on time because ordinary PRC citizens could not go abroad.⁷² Because the appeals court denied tort liability of the state, the statute of limitations question was not examined on appeal.⁷³

V. Individuals' Reparation Claims Against the State Under Public International Law

In some cases, plaintiffs sued Japan in Japanese courts based on public international law, which runs counter to classic international law concepts. As stated by Professor James Briely in 1963, "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another."⁷⁴ "The subject matter of the claim under international public law, including war law, is individual, but the claim is that of the state."⁷⁵ The right to enforce international public law "is not vested in the foreign individual, but in the state of his citizenship, which is accorded the right to offer diplomatic protection to its nationals."⁷⁶ An individual's claim, however, may be allowed where a treaty admits such a claim. For example, after the First World War, U.S. citizens could bring claims against Germany for violations of the law of war to the U.S.-German Mixed Claims Commission, based on Article 297(e) of the Treaty of Versailles.⁷⁷ Japanese courts followed such classic public international law theory.

⁷¹ The first instance of so-called Iki doku gasu hōdan higai baishō seikyū [Damages by abandoned poison gas and shell] case, 1843 HANREI JIHŌ 90 (Tokyo Dist. Ct., Sept. 29, 2003).

⁷² *Id.* at 104.

⁷³ The second instance (Tokyo High Ct., July 18, 2007) has not been reported but is available online, http://www.news-pj.net/siryou/2007/dokugasu_hanketsu_zenbun-20070718.html

⁷⁴ JAMES BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Humphrey Waldock, ed., Oxford Univ. Press 6th ed. 1963).

⁷⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 459 (6th ed. 2003). This statement was written in relation to a discussion of diplomatic protection. By this statement, the author did not necessarily mean that an individual is not subject to international law. His position on that point is unclear.

⁷⁶ Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize A Victim's Private Right Of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296, 307 (2002).

⁷⁷ RAINER HOFMANN AND FRANK RIEMANN, *COMPENSATION FOR VICTIMS OF WAR, BACKGROUND REPORT 10* (Int'l Law Assoc., Committee on Compensation for Victims of War Mar. 17, 2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> (click "Background Report Berlin 2004").

A. The Shimoda (Genbaku) Case

In the Genbaku [atomic bombing] case (known as the Shimoda case under the U.S.-style case naming method and referred to as such hereafter),⁷⁸ atomic bomb survivors sought damages against the state because their rights to obtain damages from the United States were waived by the 1951 Peace Treaty with Japan (the San Francisco Peace Treaty).⁷⁹ The plaintiffs asserted that the U.S. atomic bombings were illegal under international law and customary international law. The Tokyo District Court asked for the expert opinions of three Japanese international law professors who were very highly regarded in Japan.⁸⁰ The ensuing judgment is regarded as a comprehensive summary of traditional international law theories.⁸¹

First, the court examined the Laws and Customs of War on Land⁸² and other sources of international law,⁸³ and ruled that the atomic bombings at Hiroshima and Nagasaki were illegal

⁷⁸ The Shimoda Case, 14-12 KAMINSHŪ 2435 (Tokyo Dist. Ct. Dec. 7, 1963).

⁷⁹ Treaty of Peace with Japan, Sept. 8, 1951, 3 UST 3169, TIAS 2490 (1951). *See* discussion, Part VI, *infra*.

⁸⁰ Igarashi, *supra* note 1, at 4.

⁸¹ *Id.*

⁸² The Convention with Respect to the Laws and Customs of War on Land (Hague Convention II), July 29, 1899, 32 Stat. 1803, available online from the Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>; and the Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), Oct. 18, 1907, 36 Stat. 2277, available online from the Avalon Project, <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>. Article 23 of both Conventions prohibited the use of poison or poisoned arms; killing or treacherously wounding individuals belonging to a hostile nation or army; and the use of arms, projectiles, or material of such a nature as to cause superfluous injury, among other acts. Article 25 prohibited the attack or bombardment of towns, villages, habitations, or buildings that are not defended. Article 26 obligates the Commander of an attacking force, before commencing a bombardment (except in the case of an assault), to do all he can to warn the authorities. Article 27 obligated the state to take all necessary steps in sieges and bombardments to spare as far as possible buildings devoted to religion, art, science, and charity; hospitals; and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

⁸³ The court considered the following sources of international customary law:

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration of 1868), which provides, “The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.” The text of the Declaration is available online at the World War I Document Archive, [http://wwi.lib.byu.edu/index.php/St. Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles](http://wwi.lib.byu.edu/index.php/St._Petersburg_Declaration_Renouncing_the_Use_in_Time_of_War_of_Certain_Explosive_Projectiles).
- Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (Hague IV, Declaration III, July 29, 1899), which prohibited so-called Dumdum bullets. A copy of the Declaration is available online from the Avalon Project, <http://www.yale.edu/lawweb/avalon/lawofwar/dec99-03.htm>.
- Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, which forbade bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings. The text is available online from the Avalon Project, <http://www.yale.edu/lawweb/avalon/lawofwar/hague09.htm>.

under international law, although there was no direct provision of international law that prohibited the atomic bombing of cities.⁸⁴ Regarding the position of war victims, the court denied that an individual is subject to public international law. The court stated that, unless individual claims are specifically allowed under an applicable treaty, such as U.S. citizens' claims against Germany for violations of the laws of war under the U.S.-German Mixed Claims Commission established by the Treaty of Versailles, individuals are not subject to international law.⁸⁵ Therefore, individual claimants could not demand compensation for individual losses under international law.

The court then examined whether an individual may sue a state in either or both countries that fought the war—in this case, Japan and the United States. The court concluded that the plaintiffs could not sue the United States in Japanese courts because it is an established rule of international law that a state is not subject to the civil jurisdiction of other countries.⁸⁶ The court also stated that the plaintiffs could not sue the United States and President Truman in U.S. courts because of sovereign immunity.⁸⁷ The plaintiffs did not appeal the case, partially because they

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- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (signed at Geneva, June 17, 1925), which prohibited the use of “asphyxiating gas, or any other kind of gas, liquids, substances or similar materials.” The text of the Convention is available at the University of Bradford website, <http://www.brad.ac.uk/acad/sbtwc/keytext/genprot.htm>.
 - The Hague Rules of Air Warfare (December, 1922–February, 1923), which prohibited “aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants.” (Article 23). Article 24 provides:
 - 1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
 - 2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.
 - 3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.
 - 4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.
 - 5) A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

A copy of the Hague Rules of Air Warfare is available at the World War I Document Archive, http://wwi.lib.byu.edu/index.php/The_Hague_Rules_of_Air_Warfare.

⁸⁴ Shimoda Case, 14-12 KAMINSHŪ 2435, 2456-66 (Tokyo Dist. Ct. Dec. 7, 1963).

⁸⁵ *Id.* at 2467-70.

⁸⁶ *Id.* at 2470.

⁸⁷ *Id.* at 2470-72.

were satisfied with the judgment that stated that atomic bombing was illegal under international law.⁸⁸

B. Western POW Cases

In 1994 and 1995, former POWs sued the Japanese government based on customary international law or Hague Convention IV Concerning the Laws and Customs of War on Land of 1907.⁸⁹ Former Dutch, British, U.S., Australian, and other POWs sought damages for POW abuses (hereinafter, “the Western POW cases”).⁹⁰ They were assaulted, forced to work hard without enough food, transported in unsanitary spaces in ships without toilets, and not treated when they were sick, among other things.⁹¹ During WWII, there were many cases alleging that the Japanese military inhumanely treated Allied POWs. Japan ratified Hague Convention IV in 1911. Japan had signed, but not ratified, the Convention Relative to the Treatment of Prisoners of War of 1929 (the 1929 Geneva Convention).⁹² Nevertheless, immediately after WWII, many Japanese were indicted and convicted of war crimes, which included POW abuses. Governments participating in the San Francisco Peace Treaty conference and negotiations discussed reparations to compensate POW abuse, as explained below. Article 3 of Hague Convention IV provides:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁹³

It is clear from this text that if a military member violated the Hague Regulation while on duty, the country to which the member belongs is responsible to pay compensation. Article 3 did not, however, indicate how and to whom such compensation should be paid. The plaintiffs in the Western POW cases and some scholars argued that an individual has a claim against a state under Article 3. They cited cases from other countries as precedent for the states’ payment to

⁸⁸ Nihon Hidankyo [Japan association of atomic bomb survivors], Genbaku saiban [Atomic bomb lawsuit], http://www.ne.jp/asahi/hidankyo/nihon/rn_page/menu_page/side_menu_page/saiban_sosyou/lawsuit.htm (last visited Sept. 26, 2008).

⁸⁹ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *supra* note 82.

⁹⁰ The first instance of Dutch POWs Case, 1685 HANREI JIHŌ 19; the first instance of U.K. POWs Case, 1685 HANREI JIHŌ 4 (Tokyo Dist. Ct. Nov. 26, 1998).

⁹¹ The first instance of Dutch POWs Case, 1685 HANREI JIHŌ at 29.

⁹² INT’L MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO JUDGMENT 49 (B.V.A. Röling and C.F. Rüter eds., 1977).

⁹³ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *supra* note 82, art. 3.

individuals based on this provision,⁹⁴ as well as cases grounded in other treaties and international customary law.⁹⁵ They also asserted that the drafting record of Article 3 supported their view.

The Tokyo District Court in the Dutch POWs case denied this claim for the following reasons:

- (1) In general, public international law regulates interstate rights and obligations;
- (2) When a treaty is applied to individual claims against the state in a domestic court, the contents of the claim under the provision of the treaty should be very clear from the viewpoint of balance of powers and stability of law;
- (3) The text of Hague Convention IV never suggested that an individual had claims against the state;
- (4) The drafting record of the Convention did not support the plaintiffs' view, but rather was based on the assumption that compensation for individuals would be provided through pursuing diplomatic protection by the state to which the individual belonged.⁹⁶

The court also found that international cases presented by the plaintiffs as evidence that individuals be awarded damages by states under Hague Convention IV did not support the plaintiffs' argument.⁹⁷ The judgment in Tokyo District Court in the British POWs case was similar to the Dutch POWs case. In both cases, the Tokyo District Court also denied the existence of customary international law that admitted an individual's claim against a state where military members did harm to the individual.⁹⁸ In both cases, the Tokyo High Court rejected appeals from the plaintiffs and decided the cases on similar grounds as the District Court.⁹⁹ In

⁹⁴ The first instance of Dutch POWs Case, 1685 HANREI JIHŌ at 26; the first instance of U.K. POWs Case, 1685 HANREI JIHŌ at 11. The cases referenced in plaintiffs' briefs included: a case involving a resident in Occupied Germany who was injured by a motor vehicle that a British occupation force member drove, Administrative Court of Appeal of Münster, Germany (Apr. 9, 1952); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992); and *Princz v. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (U.S. case citations provided by the author).

⁹⁵ The first instance of Dutch POWs Case, 1685 HANREI JIHŌ at 26; the first instance of U.K. POWs Case, 1685 HANREI JIHŌ at 9. The cases referenced in plaintiffs' briefs included: *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15; *Dewey v. United States*, 178 U.S. 510 (1900); *Commercial and Estates Company of Egypt v. Board of Trade (Ct. of Appeals, U.K., July 15, 1924)*; and *Requisitions in Epirus (Ct. of Appeals, Athens, Greece)*.

⁹⁶ The first instance of Dutch POWs Case, 1685 HANREI JIHŌ at 19, 29-32.

⁹⁷ The first instance of U.K. POWs Case, 1685 HANREI JIHŌ at 4, 13-18.

⁹⁸ *Id.* at 4, 18; the first instance of Dutch POWs Case, 1685 HANREI JIHŌ at 19, 32.

⁹⁹ The second instance of Dutch POWs Case, 1769 HANREI JIHŌ 61 (Tokyo High Ct., Oct. 11, 2001); The second instance of U.K. POWs Case, 1802 HANREI JIHŌ 76 (Tokyo High Ct., Mar. 27, 2002).

the Dutch POWs case, the Tokyo High Court stated that giving individuals the right to claim war damages would not necessarily bring better protection for individuals. The Court said that, when winner and loser states negotiate war reparations issues, many factors are considered, including the loser state's economic ability to pay reparations and the loser state's potential claim derived from the winner state's illegal conduct, which would almost never be paid to the loser state by the winner state. In the case of war reparations for individuals, the financial situation of the losing country, reconstruction policy, and equality among people who receive reparations, among other things, are not considered, the court said.¹⁰⁰ The Supreme Court declined to accept appeals from the POW plaintiffs in 2004.¹⁰¹

C. Discussions Outside Japan

Outside of Japan, the same arguments have been presented regarding reparations claims by individuals against the state. Special Rapporteur Gay McDougall submitted a final report, titled *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights in 1998, which stated:

[T]he Japanese Government's assertions that individuals are not subjects of international law are contradicted by several sources of international law, including: the Hague Convention No. IV of 1907; the Paris Peace Conference of 1919 (Treaty of Versailles); the Charter of the Tokyo War Crimes Tribunal; and customary international law. These various legal documents and theories demonstrate the obligation of States to pay compensation for breaches of international law.¹⁰²

The International Law Association established the International Committee on Compensation for Victims of War in May 2003, whose goal is to adopt a Declaration of International Law Principles on Compensation for Victims of War by 2010.¹⁰³ During Committee meetings in 2004 and 2005, the Committee found as follows:

There was no consensus as to whether the present state of international law, as it results from applicable treaty and customary law, allows for any final conclusion as to the existence of a right to compensation, held and being enforceable by the individual victims of such violations of international law, as distinct from the universally accepted existence

¹⁰⁰ The second instance of Dutch POWs Case, 1769 HANREIJIHŌ at 67 and 70.

¹⁰¹ Haruyuki Yamate, Seminar materials No. 5, (124), *supra* note 20, , http://page.freett.com/haruyamate/new_page_3-5.htm (last visited Sept. 26, 2008).

¹⁰² Gay J. McDougall, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, app. § VI(A), (B)(1), E/CN.4/Sub.2/1998/13 (U.N. Comm'n on Human Rights, June 22, 1998), *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/7fba5363523b20cdc12565a800312a4b/3d25270b5fa3ea998025665f0032f220?OpenDocument#Appendix>.

¹⁰³ Luke T. Lee, *Introduction to INTERNATIONAL LAW ASSOCIATION, TORONTO CONFERENCE REPORT: COMPENSATION FOR VICTIMS OF WAR COMMITTEE 1* (2006), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> (click "Conference Report Toronto 2006").

of the right of States to claim—in their own right—‘compensation’ for violations of international law norms the victims of which were their nationals.¹⁰⁴

Furthermore, Professor Rainer Hofmann, Co-Rapporteur of the Committee, wrote:

While this obligation to pay compensation [under Article 3 of Hague Convention IV] is certainly partly aimed at ultimately benefiting the victims of unlawful conduct, it was for a long period of time understood as not empowering individuals to claim such compensation themselves, but as restraining the traditional rule that claims for compensation may only be made by States against another State. This understanding has been—and still is—shared by a large number of courts in different countries and many scholars. So far, only the Greek court dealing in the first instance with the *Distomo* case found that the victims of the massacre had a right to claim compensation under Article 3 of the 1907 Hague Convention IV¹⁰⁵

Professor Hofmann concluded that there is not “sufficient state practice to hold that Article 3 of the 1907 Hague Convention IV, as it was to be interpreted at the time of World War II, did provide for an individual right to reparation.”¹⁰⁶ However, he also noted that recent developments in international law made it possible to argue that Article 3 now provides for an individual right to reparations.¹⁰⁷ The United Nations adopted a resolution on December 16, 2005,¹⁰⁸ that recognizes a victim’s right to reparations that can be claimed by the individual. In a 2008 draft report, Hoffman made a similar statement.¹⁰⁹

VI. San Francisco Peace Treaty

Unlike Germany, which has not concluded a peace treaty with the Allied nations after WWII, Japan concluded a peace treaty with forty-six Allied nations, including the United States, in September 1951.¹¹⁰ The Treaty of Peace with Japan, commonly known as the San Francisco

¹⁰⁴ *Id.* at 2-3.

¹⁰⁵ Rainer Hofmann, *Do victims of Armed Conflicts Have an Individual Right to Reparation?*, in INTERNATIONAL LAW ASSOCIATION, TORONTO CONFERENCE REPORT 4, *supra* note 103, at 7 (footnotes omitted).

¹⁰⁶ *Id.* at 8.

¹⁰⁷ *Id.*

¹⁰⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (Dec. 16, 2005).

¹⁰⁹ Rainer Hofmann, *Preliminary Remarks*, to INTERNATIONAL LAW ASSOCIATION, DRAFT REPORT OF 2008 RIO DE JANEIRO CONFERENCE 2 (2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> (click “Draft Conference Report Rio 2008”).

¹¹⁰ Treaty of Peace with Japan, *supra* note 79. Forty-nine countries signed the Treaty, but three among them did not ratify the treaty.

Peace Treaty, became effective and Japan regained full sovereignty on April 28, 1952.¹¹¹ Reparations were discussed during the peace conference. Article 14 of the Treaty provides:

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

...

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.¹¹²

At the peace conference, reparation was “the most controversial aspect of peacemaking.”¹¹³ At that time, imposing immediate unlimited reparation responsibility on Japan meant the United States would have had to cover the deficit. Secretary of State John Foster Dulles, the U.S. delegate to the peace conference, stated:

Since the surrender, Japan has been 2 billion dollars short of the money required... The United States had made good that 2 billion dollar deficit... But the United States is entitled to look forward to Japan’s becoming economically self-sustaining, so as to end dependence on us: and it is not disposed, directly or indirectly, to pay Japan’s future reparations.¹¹⁴

¹¹¹ BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: JAPAN (Oct. 2007), <http://www.state.gov/r/pa/ei/bgn/4142.htm>.

¹¹² Treaty of Peace with Japan, *supra* note 79, art. 14(a), (b).

¹¹³ Statement of John Foster Dulles *in* CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN 74, 82 (U.S. Dep’t of State 1951).

¹¹⁴ *Id.* at 82-83.

For this reason, it was not desirable for the United States and Japan if Japan was obligated to pay monetary reparation. Instead, reparation through the provision of services was planned.¹¹⁵ Dulles described the formula at the conference as follows:

Japan has a population not now fully employed, and it has industrial capacity not now fully employed. Both of these aspects of unemployment are caused by lack of raw materials. These, however, are possessed in goodly measure by the countries which were overrun by Japan's armed aggression. If these war-devastated countries send to Japan the raw materials which many of them have in abundance, the Japanese could process them for the creditor countries and by these services, freely given, provide appreciable reparations.¹¹⁶

Article 14(a)1 of the San Francisco Peace Treaty states that Japan will pay reparation “by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.” However, bilateral negotiations between Japan and the Allied Powers “whose present territories were occupied by Japanese forces and damaged by Japan” led Japan to pay monetary compensation in part.¹¹⁷ The Japanese government has paid reparations and provided economic cooperation for these countries for the purpose of post-war settlement.¹¹⁸

The San Francisco Peace Treaty also dealt with reparations claims from Japan. Article 19(a) of the Treaty provides:

Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.¹¹⁹

When individuals sought compensation for war damages from the Japanese government and/or Japanese companies, the meaning and effect of Article 14 was argued in both Japanese and U.S. courts. Article 19 was also argued in Japanese courts when Japanese nationals sued their government in Japan.

In the Peace Treaty Claims Waiver case, the plaintiff sought damages from the government, alleging that the state illegally caused damages to the plaintiff by concluding the

¹¹⁵ Philippines insisted possibility to receive reparations in form of goods and services should not be denied because the bilateral negotiations for reparations would start subsequent to conclusion of the Peace Treaty, based on Japan's financial conditions at such future time. 694.001/8-351: Telegram, The Ambassador in the Philippines (Cowen), Dep't of State, VI FOREIGN RELATIONS OF THE UNITED STATES, 1237, 1238 (1951).

¹¹⁶ Statement of John Foster Dulles, *supra* note 113, at 83-84.

¹¹⁷ Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, JAPANESE ANNUAL OF INT'L LAW 37-38, 46 (1994).

¹¹⁸ *Id.* at 38.

¹¹⁹ Treaty of Peace with Japan, *supra* note 79, art. 19(a).

San Francisco Peace Treaty.¹²⁰ The plaintiff alleged that the Peace Treaty made it impossible for the plaintiff to seek damages from U.S. soldiers because the Japanese government waived all claims of the Japanese people against other treaty parties, including the United States, in Article 19 of the Peace Treaty.¹²¹ Therefore, the plaintiff argued, the government was required to pay compensation to the plaintiff based on Article 29 of the post-WWII Constitution, which guarantees compensation for taking private property for public use. The plaintiff was shot by two U.S. soldiers of the Occupying Force and severely paralyzed during the post-WWII Allied Occupation.¹²² Under Japanese law, the plaintiff would have been able to claim damages against them based on tort. During the trial, the state's first defense was that the government did not waive the plaintiff's claims against the U.S. soldiers because, "[w]hat is covered by Article 19(a) was, when compared with [subsection] (c) of the same Article,^[123] only the claims of our country against the country that the offenders belong to, namely so-called diplomatic protection."¹²⁴ The state insisted that only diplomatic protection was waived, but not individuals' claims themselves. The Tokyo District Court, however, stated that the government's theory was wrong. Article 19(a) of the Peace Treaty should mean "all claims of our country and our nationals against the allied countries and their nationals, caused by the allied forces and the occupation government in Japan, were waived based on the words of the article: 'Japan waives all claims of Japan and its nationals,'"¹²⁵ the court said. On appeal, the Tokyo High Court agreed with the District Court.¹²⁶ Corresponding to the government's assertion that the state cannot waive its nationals' individual rights to claim compensation, the High Court pointed out that, though there would be various legal theories to explain the situation, it can be concluded that the plaintiff lost a claim of damages based on tort through Article 19(a) of the Peace Treaty. Though the government might

¹²⁰ The first instance of Heiwa jōyaku seikyūken hōki baishō seikyū soshō [Case seeking damages caused by claims waiver by the Peace Treaty (Peace Treaty Claims Waiver Case)], 7-8, KAMINSHŪ 2239, 2240-41 (Tokyo Dist. Ct. Aug. 20, 1956).

¹²¹ *Id.*

¹²² *Id.* at 2240.

¹²³ Article 19(c) of the Peace Treaty reads:

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before 1 September 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after 2 September 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

¹²⁴ The first instance of Peace Treaty Claims Waiver Case, 7-8 KAMINSHŪ at 2241 (translated by the author).

¹²⁵ *Id.* at 2242.

¹²⁶ The second instance of Peace Treaty Claims Waiver Case, 10-4 KAMINSHŪ 712 (Tokyo High Ct. April 8, 2007).

not directly waive an individual's claim, it agreed to the denial of claims of Japanese nationals in Article 19(a) to other parties of the Peace Treaty.¹²⁷

In the Shimoda case the court took the same position.¹²⁸ It stated that the claims of Japanese nationals that were waived in Article 19 of the San Francisco Peace Treaty were domestic claims of Japanese nationals under Japanese law or the law of the Allied Powers, against the Allied Powers and their nationals. The court noted that all three of the case's international law professor experts concluded as such.¹²⁹

In the *Canada zaigai shisan hoshō seikyū* [Compensation for Seized Properties in Canada] case, the Court's position looked ambiguous.¹³⁰ In that case, the plaintiffs lost bank deposits in Canada, based on Article 14(a)2(I) of the Treaty, as further explained in the next section. The provision gave the Allied Powers the right to seize, retain, liquidate or otherwise dispose of all property, rights, and interests of Japan and Japanese nationals that were subject to their jurisdictions. The plaintiffs sought compensation from the Japanese government. The Supreme Court wrote, "our country was pressured to agree not to use the so-called right of objection or diplomatic protection that our country possesses in order to prevent unfair treatment of our nationals' properties."¹³¹ It may appear that the Court agreed with the government's assertion that the government waived the right of diplomatic protection in Article 14 of the San Francisco Peace Treaty. While the Court decided that the loss of properties was one of war damages, however, it stated that the state does not compensate for such losses. Therefore, it cannot be concluded that the Supreme Court held that the right of diplomatic protection was waived by Article 14(a)2(I) of the Treaty.

In recent cases, the state changed its position or, at a minimum, the articulation of its argument. In the second instance of the Dutch POWs case, the state added a new defense based on Article 14(b) of the Peace Treaty with Japan:

By virtue of this provision [Article 14(b) of the Peace Treaty of San Francisco], the claims that the Allied Powers and their nationals, and Japan and its nationals have against each other were ultimately and completely settled, and claims of nationals of the Allied Powers were "abandoned" by the Allied Powers. Namely, it should be understood that the legal obligation of Japan and Japanese nationals to satisfy claims of nationals of the

¹²⁷ *Id.* at 715, 719-21.

¹²⁸ Shimoda Case, 14-12 KAMINSHŪ at 2435 (*see* discussion, section VI(A), *supra*).

¹²⁹ *Id.* at 2473-74.

¹³⁰ The *Canada zaigai shisan hoshō seikyū* [Compensation for Seized Properties in Canada] case: the first instance, 18-1 KŌTŌ SAIBANSHO HANREISHŪ 62 (Tokyo Dist. Ct. Feb. 25, 1963), attached to the High Court Judgment; the second instance, 18-1 KŌTŌ SAIBANSHO HANREISHŪ 56 (Tokyo High. Ct. Jan. 30, 1965); and the third instance, 22-12 MINSHŪ 12, 2809 (427) (S. Ct., Nov. 27, 1968).

¹³¹ Supreme Court judgment (third instance) of the Compensation for Seized Properties in Canada Case, 22-12 MINSHŪ at 2813 (431) (translated by the author).

Allied Powers that they had, based on domestic laws, ceased to exist; thus, Japan and Japanese nationals came to be able to refuse the fulfillment of the obligation.¹³²

In this case, it appears that the Tokyo High Court agreed with the state. The court noted:

By virtue of Article 14(b) of the Peace Treaty of San Francisco, it is recognized that the matter of claims that the Allied Powers and their nationals, and Japan and its nationals, have against each other was ultimately and comprehensively settled. Namely, it is appropriate to understand that the claim of nationals of Allied Powers as individuals were also “abandoned” by the Allied Powers, and, consequently, the substantive claim of nationals of the Allied Powers has also been dissolved.¹³³

It is an extremely technical discussion, but it is understood that the state’s arguments are still consistent,¹³⁴ although some believe that the state changed its reasoning from the position that the state waived individuals’ rights of diplomatic protection under the Peace Treaty to the position that the state waived substantial rights of the individual. The new explanation is that: (1) what was waived by the Peace Treaty was the right of diplomatic protection and not individuals’ claims themselves, but (2) the claims remaining for individuals were merely formal ones, and substantial parts of those claims were eviscerated.¹³⁵

The “right not to be satisfied” is not a new invention. In the Dutch POWs case, the state cited as proof the negotiation between the Netherlands, Japan, and U.S. Delegate Dulles during the Peace Treaty negotiations. In the end, the claims between Japan and the Netherlands were settled as follows: (1) Dutch Foreign Minister Dirk Stikker would send a letter to Japanese Prime Minister Shigeru Yoshida that stated Article 14(b) of the Peace Treaty was not intended to deprive private persons of their rights vis-à-vis the governments of the Allied Powers; (2) Yoshida would reply in a letter, (a) that the Japanese government did not understand that Dutch peoples’ claims would disappear after the effective date of the Peace Treaty because the Dutch government deprived its people of their private rights by signing the Peace Treaty; (b) that, however, the Japanese government pointed out that the claims of nationals of the Allied Powers could not be satisfied; and (c) that the Japanese government recognized that the Dutch government wished that the Japanese government would voluntarily satisfy certain private rights of the Allied Powers’ nationals; and (3) after subsequent negotiations, Japan would pay money to the Netherlands and the Dutch government would distribute money to former detainees of Japan. Things were done as planned.¹³⁶ In March 13, 1956, Japan and the Netherlands agreed on the

¹³² The second instance of Dutch POWs Case, 1769 HANREIJIHŌ at 65 (translated by the author).

¹³³ *Id.* at 73 (translated by the author). The bilateral negotiation between Japan and the Netherlands, and U.S. delegate Dulles’ opinion during the Peace Treaty negotiation, were discussed in the case.

¹³⁴ Asada, *supra* note 2, at 32; Haruyuki Yamate, *Chūgokujin “Ianfu” 2ji soshō Tōkyō kōsai hanketsu nit suite [Concerning Tokyo High Court Judgment of the second Chinese “comfort women” case]*, 300 & 301 (2005-2 & 3) RITSUMEIKAN HŌGAKU 1322 (628), 1353 (659) (2005).

¹³⁵ Asada, *supra* note 2, at 32.

¹³⁶ The second instance of Dutch POWs Case, 1769 HANREIJIHŌ at 72-3.

Protocol Relating to Settlement of the Problem Concerning Certain Types of Private Claims of Netherlands Nationals,¹³⁷ which provided that Japan “shall voluntarily tender as a solatium [US\$10,000,000] ... to the Government of the Kingdom of The Netherlands on behalf of those Netherlands nationals.”¹³⁸ The Dutch government “confirms that neither itself nor any Netherlands nationals will raise against the Government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals.”¹³⁹ It appears that the Tokyo High Court in the Dutch POWs case followed this understanding. The Supreme Court did not accept appeals from the POWs.¹⁴⁰

In the Second Chinese “Comfort Women” case, the Tokyo High Court went back to the old view, holding that the claims of Allied Powers’ nationals themselves were waived by the San Francisco Peace Treaty.¹⁴¹ As in the Dutch POWs case, the state argued that the legal obligation of Japan and Japanese nationals to satisfy the claims of nationals of the Allied Powers ceased to exist; as a consequence, Japan and Japanese nationals were able to refuse the fulfillment of the obligation. The Tokyo High Court denied the state’s argument. In the case, one Chinese woman and successors of another Chinese woman who was deceased sought damages against the Japanese government based on international law, Chinese law in force during WWII, and Japan’s State Tort Liability Law. The two were kidnapped, confined, and repeatedly raped by members of the Japanese Army during WWII.¹⁴² When they were kidnapped, they were only thirteen and fifteen years old. Though China was not a part of the San Francisco Peace Treaty, the Tokyo High Court examined Article 14(b) of the Treaty because it found that the article was applicable to problems between China and Japan.¹⁴³ The Supreme Court affirmed the result of the case, but changed the reasoning as mentioned in the next section.

¹³⁷ Protocol Between the Government of Japan and the Government of the Kingdom of the Netherlands Relating to Settlement of the Problem Concerning Certain Types of Private Claims of Netherlands Nationals, published in KANPŌ [Japan’s Official Gazette], Extra No. 27 (June 1, 1956).

¹³⁸ *Id.* art. 1.

¹³⁹ *Id.* art. 3.

¹⁴⁰ Haruyuki Yamate, Seminar materials No. 5. (124), *supra* note 20, citing Kyodo Communications news on March 30, 2004, http://page.freett.com/haruyamate/new_page_3-5.htm (last visited Sept. 25, 2008).

¹⁴¹ The second instance of *Chugokujin ianfu 2ji soshō* [Second Chinese Comfort Women Case], 51-11 SHŌMU GEPPŌ 2858, 2867 (Tokyo High Ct. Mar. 18, 2005). In the case, both the parties and the courts referred to the two plaintiffs as “rape victims” and distinguished them from the so-called “comfort women” in the comfort stations that were partially or, in some cases, directly controlled by the Japanese government, as discussed in Section II, above. Therefore, the case name, the second “comfort women” case, is misleading. However, the popular name of the case is used in this article.

¹⁴² *Id.* at 2858-59.

¹⁴³ See discussion of the China–Japan Peace Treaty in the next section.

The Supreme Court clearly agreed with the state's argument in the Nishimatsu Construction Company Forced Labor Case in April 2007.¹⁴⁴ In that case, the Nishimatsu Construction Company accepted an order to construct a power plant, which began in June 1943. Nishimatsu Construction could not gather enough workers for the construction project, however. The company applied to receive Chinese workers from China with the Ministry of Health and Welfare in April 1944. The company received a quota of 300 Chinese workers and entered into a contract with an organization in North China that was established by the Japanese and in charge of the transfer of Chinese workers. Nishimatsu Construction received 360 Chinese workers in China in July 1944 while the Japanese military guarded it. The plaintiffs in this case were among those workers. The Chinese workers were forced to work under extremely poor conditions, including hard labor, little food, a filthy living environment, and poor medical treatment. They were forced to work until August 1945.¹⁴⁵ The plaintiffs sued the company, claiming a violation of their labor contract, namely, lack of safety considerations of the workers.¹⁴⁶ Regarding Article 14(b) of the San Francisco Peace Treaty, the Supreme Court stated:

II

(2) As seen above, on the assumption that claims, including individuals' claims, that arose during the execution of the war were waived by both sides, the San Francisco Peace Treaty set the framework for Japan's post-WWII management[, which provided] that Japan admitted the obligation to pay reparations to the Allied Powers and allowed disposal of Japanese overseas assets in the Allied Powers' jurisdictions by the Allied Powers, and that details of war reparations were to be decided between Japan and each members of the Allied Powers, including reparation by providing service. ... The framework of the San Francisco Peace Treaty was established to achieve the purpose of the San Francisco Peace Treaty, that it would ultimately terminate the state of war between Japan and the forty-eight Allied countries and build firm friendly relationships for the future, thus it is understood that the framework was set based on the idea that it would be an obstacle for the achievement of such purpose of the Peace Treaty that, if the matters of various claims that arose during the execution of the war would be up to the disposition of rights resulting from ex post individual civil lawsuits, there would be the risk of imposing an excessive future burden on a state or its nationals on either side that is unforeseeable at the time of the conclusion of the Peace Treaty and of causing chaos.

(3) Then, considering the aim of the waiver of claims under the San Francisco Peace Treaty framework ... it is appropriate to understand that "waiver" of claims in this

¹⁴⁴ Nishimatsu Kensetsu kyōsei renkō soshō [Nishimatsu Construction Company Forced Labor Case], 61-3 MINSHŪ 1188 (S. Ct. Apr. 27, 2007).

¹⁴⁵ *Id.* at 1190 (224)-1191 (225).

¹⁴⁶ *Id.* at 1189 (223).

context means only to make the capacity to sue based on the claim lost, not to extinguish the right entirely.¹⁴⁷

The decision also mentioned the correspondence between Prime Minister Yoshida and Dutch Foreign Minister Stikker during the conference of the San Francisco Peace Treaty.¹⁴⁸

This Supreme Court decision is critical for all foreign plaintiffs in post-WWII cases. It said that Japan do not have an obligation to satisfy claims of nationals of the Treaty parties that arose due to Japan's wrongdoing during WWII under the San Francisco Peace Treaty framework. Since the Supreme Court's decision, plaintiffs in post-WWII cases have lost their cases. It is likely that POWs, forced laborers, and comfort women would lose their cases in any Japanese court.¹⁴⁹ Also, there is no necessity for courts in Japan to examine other legal issues, such as sovereign immunity, statute of limitations, or the individual's position in public international law.

In the United States, courts reached the same conclusion on the effect of waiver of claims in the San Francisco Peace Treaty when former U.S. POWs sought compensation from Japanese companies for which POWs were forced to work. In *Mitsubishi Materials Corp. v. Superior Court*, the Court of Appeal of the State of California stated that the San Francisco Peace Treaty "succinctly precludes the claims of American nationals against Japanese nationals arising out of the war."¹⁵⁰

VII. China–Japan Peace Treaty and Individuals' Claims

Not all Allied countries joined the San Francisco Peace Treaty. The delegates of the Soviet Union attended the peace conference in San Francisco, but did not sign the Treaty. China was not invited to the conference because the United States and the Soviet Union had different opinions as to which entity—China, the Republic of China (ROC), or the People's Republic of China (PRC)—had the "right and the power to bind the Chinese nation to terms of peace."¹⁵¹

The ROC desired, if it could not be a party to the multinational peace treaty, an early conclusion of a bilateral peace treaty with Japan, and the United States pressured Japan to enter

¹⁴⁷ *Id.* at 1197 (231)-1198 (232) (translated by the author). See also translation at the court's website, § II.2.(2), <http://www.courts.go.jp/english/judgments/text/2007.04.27-2004.-Ju.-No..1658.html> (last visited Sept. 26, 2008).

¹⁴⁸ *Id.* at 1198 (232).

¹⁴⁹ Professor Haruyuki Yamate listed major Japanese Newspapers' comments on the decision on his website. Haruyuki Yamate, Seminar materials No. 7, (190), *supra* note 20, http://page.freett.com/haruyamate/new_page_3-7.htm (last visited Sept. 29, 2008).

¹⁵⁰ *Mitsubishi Materials Corp. v. Superior Court*, 113 Cal. App. 4th 55, 76, 6 Cal. Rptr. 3d 159, 175 (Cal.App. 4 Dist. Nov. 5, 2003).

¹⁵¹ Statement of John Foster Dulles, CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN, RECORD OF PROCEEDINGS 74, 85 (Department of State Publication No. 4392, Dec. 1951).

into a peace treaty with the ROC immediately at the end of the Allied Occupation.¹⁵² On the same day that the San Francisco Peace Treaty became effective, the Peace Treaty between Japan and the ROC was signed.¹⁵³ The exchange note of the Treaty confirmed that “the terms of the present Treaty shall, in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be under the control of its Government.”¹⁵⁴ However, the ROC did not expand its control over the mainland. Rather, in the early 1970s, the PRC was “recognized diplomatically by most world powers.”¹⁵⁵ The PRC “assumed the China seat in the United Nations in 1971.”¹⁵⁶ In 1972, Japan and the PRC agreed on the Communique of the Government of Japan and the Government of the People’s Republic of China. The PRC and Japan then entered into the Peace and Friendship Treaty in 1978. Their Joint Communique stated in part:

2. The Government of Japan recognizes that Government of the People’s Republic of China as the sole legal Government of China.

3. The Government of the People’s Republic of China reiterates that Taiwan is an inalienable part of the territory of the People’s Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People’s Republic of China....¹⁵⁷

When Japan adopted the Joint Communique, the 1952 Japan-ROC Peace Treaty would no longer be effective.¹⁵⁸

¹⁵² See 694.0111/7-1051: Telegram, The Secretary of State to the Embassy in the Republic of China, July 10, 1951, Dep’t of State, VI FOREIGN RELATIONS OF THE UNITED STATES 1188 (1951); 693.94/9-1451: Telegram, The Secretary of State to the Embassy in the Republic of China, Sept. 14, 1951, *id.* at 1348; 694.001/10-2351, Memorandum by the Deputy Director of the Office of Chinese Affairs (Perkins) to the Assistant Secretary of State for Far Eastern Affairs (Rusk), Oct. 30, 1951, *id.* at 1389; Memorandum of Conversation, by the United States Political Advisor to SCAP (Sebald), Dec. 18, 1951, *id.* at 1443; and Memorandum of Conversation, by the Consultant to the Secretary (Dulles), Dec. 27, 1951, *id.* at 1473.

¹⁵³ The Peace Treaty between Japan and the Republic of China, Apr. 28, 1952, Treaty No. 10 of 1952 (Japan). The text of the treaty (called the Treaty of Taipei), the protocol, and exchange notes are available on the Taiwan Documents Project’s website, at http://www.taiwandocuments.org/doc_treaties.htm.

¹⁵⁴ Exchange of Notes between Japanese and Chinese Plenipotentiaries, I and II, Apr. 28, 1952, available at <http://www.taiwandocuments.org/taipei03.htm>.

¹⁵⁵ *Foreign Relations*, in U.S. STATE DEPARTMENT, BACKGROUND NOTE: CHINA, <http://www.state.gov/r/pa/ei/bgn/18902.htm#foreign> (last visited Sept. 29, 2008).

¹⁵⁶ *Id.*

¹⁵⁷ The Joint Communique of the Government of Japan and the Government of the People’s Republic of China, Sept. 29, 1972, available on Japanese Ministry of Foreign Affairs’ website, at <http://www.mofa.go.jp/region/asia-paci/china/joint72.html>.

¹⁵⁸ Ministry of Foreign Affairs, Rekishi mondai [History issues] Q&A 7, http://www.mofa.go.jp/mofaj/area/taisen/qa/shiryo/shiryo_06.html (last visited Sept. 22, 2008).

Reparation was one of most important matters in the negotiations between Japan and the two Chinas.¹⁵⁹ Reparations were waived by both the ROC and the PRC in any event, but it was not clear when they were waived. When Japan and the PRC negotiated the Joint Communiqué, the PRC's position was that the 1952 Japan-ROC Peace Treaty was invalid and reparations were waived by the Joint Communiqué. The Japanese government's position was that the 1952 Japan-ROC Peace Treaty was valid, but when Japan recognized the PRC as China's authentic government instead of the ROC, the Peace Treaty succeeded from the ROC to the PRC. Both governments conceded and deliberately ambiguous language was adopted in the Joint Communiqué.¹⁶⁰ Regarding reparations, paragraph 5 of the Joint Communiqué provided: "The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan."¹⁶¹ The Joint Communiqué does not state that the PRC waives all reparation claims of the PRC and its nationals, as does Article 14(b) of the San Francisco Peace Treaty. Such complications and ambiguity troubled courts in Japan when they decided post-WWII compensation cases.

Some lower courts determined that the PRC waived reparation claims in the Joint Communiqué and the 1978 Japan-PRC Peace and Friendship Treaty, but individuals' claims were not waived by those documents. One of reasons for the decisions was that the Joint Communiqué did not specify that individuals' claims were waived.¹⁶² The Tokyo High Court of the Second Comfort Women case adopted the government's position that the 1952 Treaty applied to war reparation issues between Japan and China, including the PRC.¹⁶³ If the 1952 Japan-ROC Peace Treaty applied to the claims of the PRC people, the interpretation of individuals' claims would be the same as when Article 14(b) of the San Francisco Peace Treaty applied. The 1952 Japan ROC Peace Treaty states:

Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.¹⁶⁴

¹⁵⁹ Masahiko Asada, *Nikka heiwa jōyaku to kokusai hō [Peace Treaty between Japan and Republic of China and International Law]* (5), 156-2 HŌGAKU RONSŌ 1, 11-15. (2004). Professor Asada wrote a comprehensive and detailed article on the 1952 Japan-China Peace Treaty, which appeared in multiple journal issues, *Nikka heiwa jōyaku to kokusai hō [Peace Treaty between Japan and Republic of China and International Law]* (1) –(6), (1) in 147-4 HŌGAKU RONSŌ, (2) in 151-5 HŌGAKU RONSŌ, (3) in 151-2 HŌGAKU RONSŌ, (4) in 152-4 HŌGAKU RONSŌ, (5) in 156-2 HŌGAKU RONSŌ, and (6) not yet published.

¹⁶⁰ *Id.* (5), at 11-15.

¹⁶¹ The Joint Communiqué, *supra* note 157, Item 5 (emphasis added).

¹⁶² Asada, *supra* note 159, (5) at 38-50.

¹⁶³ The Second Chinese Comfort Women Case, 51-11 SHŌMU GEPPŌ 2858 (46), 2869-70 (57-58) (Tokyo High Ct. Mar. 18, 2005).

¹⁶⁴ The Peace Treaty between Japan and Republic of China, *supra* note 153, art. 11.

The Tokyo High Court applied article 14(b) of the San Francisco Peace Treaty to the plaintiffs' claims and denied damages.¹⁶⁵

The Supreme Court in the Nishimatsu Construction Case ended such discussions. The Court in that case denied application of the 1952 Japan-ROC Peace Treaty to people on mainland China. One of the reasons was that the ROC never controlled mainland China after the 1952 Japan-ROC Peace Treaty was concluded.¹⁶⁶ The Supreme Court found, after examining the background of the Joint Communique, that it was, in essence, a peace treaty established under the framework of the San Francisco Peace Treaty.¹⁶⁷ The Court stated that claims of PRC nationals are treated the same as those of Allied Powers nationals:

[I]t should be understood that the claims of nationals of the PRC against Japan, or Japanese nationals or juridical persons, that arose in the course of prosecution of the Japan-China War lost the ability to be enforced through lawsuits as the result of Item 5 of the Japan-China Joint Communique, and where the waiver of the claim under the said paragraph of the Joint Communique is raised as a defense against such a claim in a court procedure, the claim is unavoidably dismissed.¹⁶⁸

The Supreme Court also reversed the relevant part of the Tokyo High Court judgment of the Second Chinese Comfort Women Case, though the outcome of the case was the same, on the same day that it decided the Nishimatsu Construction Case.¹⁶⁹

VIII. What Was Taken From or Paid By Japan

The fact that the Allied Powers waived reparation claims did not mean they did not receive anything from Japan.¹⁷⁰ Some Japanese assets were simply taken by them. Japan also paid a significant amount of money to the Allied Powers through bilateral agreements. In many such cases, Japan and the other country used a form of economic aid from Japan, instead of paying war reparations in cash. Only a small part of the assets or benefits were distributed to individuals by the governments who took them.

¹⁶⁵ The Second Chinese Comfort Women Case, 51-11 SHŌMU GEPPŌ at 2867 (55).

¹⁶⁶ Nishimatsu Construction Company Forced Labor Case, 61-3 MINSHŪ at 1200 (234).

¹⁶⁷ *Id.* at 1201-03 (235-37).

¹⁶⁸ *Id.* at 1203 (237) (translated by the author).

¹⁶⁹ The Supreme Court Judgment (third instance) of the Second Chinese Comfort Women Case (S. Ct. 1st petit bench Apr. 27, 2007), *available at* http://www.courts.go.jp/search/jhsp0030?action_id=dspDetail&hanreiSrchKbn=02&hanreiNo=34591&hanreiKbn=01 (click “全文”).

¹⁷⁰ The Ministry of Foreign Affairs posted a table on its website that shows payment of reparations, quasi-reparations, and other forms of compensation, http://www.mofa.go.jp/mofaj/area/taisen/qa/shiryo/pdfs/shiryo_07.pdf (last visited Aug. 7, 2008).

A. Japanese Assets Removed Before the Conclusion of the Peace Treaty

President Truman appointed Edwin Pauley as the U.S. Representative to the Reparations Commission in 1945.¹⁷¹ Pauley called for a program of removal of substantial shares of Japanese plant capacity for the manufacture of machine tools, aircraft, bearings, ships, and steel, among other things.¹⁷² His plan was not fully implemented because, if it had been, the Japanese economy would have been excessively weakened and the U.S. burden to support Japan would have increased. Nonetheless, by May 1950, 43,919 pieces of machinery and other items were removed from plants in Japan and shipped to the Allied Powers. Their total estimated value was 185 million yen (then about US\$48 million)¹⁷³ as of 1939. The ratio of assets received was as follows: 54.1% for China, 19.0% for Philippine, 15.4% for the U.K. (Burma, Malay, and others), and 11.5% for the Netherlands (Dutch East Indies).¹⁷⁴ Outside of Japan, the Soviet Union stripped Japanese assets in Manchuria without the consent of the United States, China, and other Allied Powers.¹⁷⁵

B. Compensation Specified in the Peace Treaty

1. **Article 14(a)1**

Article 14(a)1 of the San Francisco Peace Treaty obliged Japan to:

promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging, and other work for the Allied Powers in question.¹⁷⁶

Japan had agreements with Burma,¹⁷⁷ the Philippines,¹⁷⁸ Indonesia,¹⁷⁹ and Vietnam¹⁸⁰ under this provision.¹⁸¹ War compensation and gratuitous economic aid were carried out through

¹⁷¹ Oral History Interview with Edwin W. Pauley, Harry S. Truman Library and Museum (Mar. 3, 1971), <http://www.trumanlibrary.org/oralhist/pauleye.htm>.

¹⁷² EDWIN W. PAULEY, REPORT ON JAPANESE REPARATIONS TO THE PRESIDENT OF THE UNITED STATES, NOVEMBER 1945 TO APRIL 1946 (Apr. 1, 1946) (available at the Library of Congress, Call No. D819.J3 P3).

¹⁷³ In 1939, 100 yen was the equivalent of about US\$25.984. Nekokuti, Senzen senchū kawase sōba [Foreign exchange rates during and before WWII], Sensō keizai [War Economy], <http://www.geocities.co.jp/Technopolis/5215/kawasesouba.htm> (private website)

¹⁷⁴ TAKASHI TSUKAMOTO, SENGO HOSHŌ MONDAI – SŌRON 1 [POST WAR COMPENSATION ISSUES – GENERAL ISSUES 1], Issue Brief No. 228 at 6 (National Diet Library Oct. 15, 1993).

¹⁷⁵ Oral History Interview with Raphael Green, Harry S. Truman Library and Museum (May 4, 1991), <http://www.trumanlibrary.org/oralhist/greenr.htm> (last visited Sept. 29, 2008); and Satoshi Kuniyoshi, *Soren sansen go no tai nichi baisho seisaku no henshen* [Changes on policies against Japan after Soviet Union's participation to war], CHARIBARI (May 20, 2008), <http://www.hit-charivari.com/article/data/p0135.html>.

¹⁷⁶ Treaty of Peace with Japan, *supra* note 79, Art. 14(a)1.

¹⁷⁷ Agreement for Reparations and Economic Co-operation Between Japan and the Union of Burma, Nov. 5, 1954, Treaty No. 4 of 1955 (Japan) and Agreement Between Japan and The Union of Burma on Economic and

the construction of power plants, dams, water and sewer works, and agricultural centers, and through the grant of ships and vehicles.¹⁸² Gratuitous economic aid and credits were not part of the formal reparations because the San Francisco Peace Treaty allowed only reparation by service from Japan. However, Burma, the Philippines, Indonesia, and Vietnam were not satisfied with reparation by service, and therefore entered into an agreement with Japan that allowed gratuitous economic aid and credits to substantially supplement war compensation.¹⁸³ Japan negotiated the total amount of payment with each of the four countries, including reparation, gratuitous economic aid, and credit, to settle the reparation issue,¹⁸⁴ as illustrated in the table below:

Technical Co-operation, Mar. 29, 1963, Treaty No. 32 of 1963 (Japan), *both available at* <http://www.gwu.edu/~memory/data/treaties/Burma.pdf>. When the second agreement was made, the protocol was also agreed to. It provided:

The Union of Burma shall not present any claim based on the provisions of Article V, paragraph 1(a)(III) of the Treaty of Peace between Japan and the Union of Burma signed at Rangoon on November 5, 1954, after the date of coming into force of the Agreement between Japan and the Union of Burma on Economic and Technical Co-operation.

Protocol Concerning The Union of Burma's Claim Based on Article V, Paragraph 1(a) (III) of The Treaty of Peace Between Japan and The Union of Burma Signed at Rangoon on November 5, 1954, Mar. 29, 1963, Treaty No. 33 of 1963 (Japan).

¹⁷⁸ Reparations Agreement Between Japan and The Republic of the Philippines, May 9, 1956, Treaty No. 16 of 1956 (Japan), *available at* <http://www.gwu.edu/~memory/data/treaties/Philippines.pdf>.

¹⁷⁹ Reparations Agreement Between Japan and The Republic of Indonesia, Jan. 20, 1958, Treaty No. 4 of 1958 (Japan), *available at* <http://www.gwu.edu/~memory/data/treaties/Indonesia.pdf> (scroll down to page 15).

¹⁸⁰ Accord de Réparations Entre le Japon et la République du Viet-Nam [Agreement on Reparations Between Japan and the Republic of Vietnam], May 13, 1959, Treaty No. 1 of 1960 (Japan); *and* Accord Sur les Prets Entre le Japon et la République du Viet-Nam [Agreement Concerning Credit Between Japan and the Republic of Vietnam], May 13, 1959, Treaty No. 2 of 1960 (Japan), *both available at* <http://www.gwu.edu/~memory/data/treaties/Vietnam.pdf>.

¹⁸¹ Technically speaking, because Burma and Indonesia were not parties of the San Francisco Peace Treaty, Japan and those countries had separate peace treaties under the framework of the San Francisco Peace Treaty. Article 26 of the San Francisco Peace Treaty provides:

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of 1 January 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty.

¹⁸² TSUKAMOTO, *supra* note 174, at 8.

¹⁸³ Tadataka Sata's question and Akira Nakagawa's answer, GAIMU IINKAI GIROKU [FOREIGN AFFAIRS COMMITTEE MINUTES] No. 4 of No. 21 Diet Session, 12, House of Councillors (Dec. 19, 1954).

¹⁸⁴ TSUKAMOTO, *supra* note 174, at 8.

Country	Reparation (US\$1000)	Grant Aid (US\$1000)	Credit (US\$1000)
Burma	200,000	140,000	80,000
Philippines	550,000		250,000
Indonesia	223,080	176,910*	400,000
South Vietnam	39,000		16,600
Total	1,012,080	316,910	746,600

* Exemption from trade settlement.¹⁸⁵

2. Article 14(a)2

The Allied Powers seized properties of Japan and Japanese nationals in their jurisdictions pursuant to Article 14(a)2 of the San Francisco Peace Treaty, which provided:

(I) Subject to the provisions of subparagraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of –

(A) Japan and Japanese nationals,

(B) persons acting for or on behalf of Japan or Japanese nationals, and

(C) entities owned or controlled by Japan or Japanese nationals[.]¹⁸⁶

According to the Japanese government's research, as of August 1945, the total amount of Japan's assets abroad was US\$23.7 billion, including: US\$4.391 billion in Korea; US\$2.658 billion in Taiwan; US\$9.158 billion in North East China; US\$3.465 billion in North China; US\$2.295 billion in Central and South China; US\$1.751 billion in other areas.¹⁸⁷ The total amount of the assets is not exactly equal to the total amount of assets disposed of by the Allied Powers, Taiwan, and Korea because certain Japanese assets were exempted from the disposition or were lost before their disposition.¹⁸⁸ China could not participate in the San Francisco Peace Conference, but the San Francisco Peace Treaty included a provision that allowed China to

¹⁸⁵ *Id.*

¹⁸⁶ Treaty of Peace with Japan, *supra* note 79, Art. 14(a)2.

¹⁸⁷ TSUKAMOTO, *supra* note 174, at 7.

¹⁸⁸ *Id.*

benefit from Japanese assets in China.¹⁸⁹ Japanese assets in Taiwan and Korea were subject to a special agreement between Japan and those countries, to be entered into in the future.¹⁹⁰

Based on this provision, many Japanese private properties abroad were taken by the Allied Powers whether or not the assets were acquired abroad through activities that related to the war. Some thought it was unreasonable. In the Seized Properties in Canada case,¹⁹¹ Japanese nationals who lost property in Canada sued the government mainly based on Article 29 of the Constitution of Japan, which in paragraph 3, provides: “Private property may be taken for public use upon just compensation therefor.”¹⁹² The Tokyo High Court admitted that the plaintiffs lost deposits because of the state’s act of concluding the Peace Treaty. Under the High Court’s view, the state approved the seizure of Japanese property located in Allied Powers’ jurisdictions by the Allied Powers for the purpose of reparation payments, and was exempt from liability for the value of the seized properties. To that extent, the court took the view that the state fulfilled part of its reparation payments as a state, or as the Japanese population as a whole, through the sacrifices of particular property owners.¹⁹³ Though Japan was not really in a position to reject or even negotiate provisions of the Peace Treaty as a defeated nation, the consequence was the same as if the state had disposed of such properties in order to partially fulfill its reparation payment obligations. In the end, however, the High Court denied compensation because there was no legislation to embody the plaintiffs’ rights.¹⁹⁴ The Supreme Court agreed with the conclusion, but disagreed with the High Court’s view as to the nature of the loss. The Supreme Court stated that, although the Japanese government agreed to the Peace Treaty in its own capacity, it was forced to agree with the Treaty’s provisions. Therefore, the Court regarded the appealing parties’ loss of properties as a form of “war damages” caused by the fact that Japan was defeated.¹⁹⁵ The Court then stated that all nationals should bear such war damages, to a greater or lesser extent, in the same manner as other damages of war, and accept such losses as an unavoidable sacrifice. Therefore, compensation for such damages is beyond the scope of Article 29, paragraph 3, of the Constitution, the court ruled.¹⁹⁶

3. Article 16

¹⁸⁹ The Peace Treaty with Japan, *supra* note 79, art. 21.

¹⁹⁰ *Id.* art. 4(a); The Treaty on Economic Cooperation and Settlement of Issues Regarding Properties and Claims Between Japan and the Republic of Korea, *supra* note 33; and The Peace Treaty between Japan and the Republic of China, *supra* note 153.

¹⁹¹ Compensation for Seized Properties in Canada Case, *supra* note 130.

¹⁹² Constitution of Japan (1946), art. 29, para. 3. The English translation of the Constitution of Japan, *supra* note 25.

¹⁹³ The second instance of Seized Properties in Canada Case, 18-1 KŌMINSHŪ at 60-61.

¹⁹⁴ *Id.* at 61-62.

¹⁹⁵ *Id.* at 2813.

¹⁹⁶ *Id.*

In order to compensate POWs who suffered at the hands of the Japanese military, Article 16 of the San Francisco Peace Treaty allowed the Allied Powers to take Japan's and the Japanese people's assets in neutral countries, providing:

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross, which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable.¹⁹⁷

Of the two options for compensation authorized by Article 16, Japan chose to transfer the equivalent of its assets and those of its nationals in neutral countries. In 1955, Japan entered into an agreement with the Red Cross and, in accordance with the agreement, paid UK£4.5 million (about US\$12.6 million).¹⁹⁸

C. Quasi-Reparations in the Form of Gratuitous Economic Aid and Credit

In the same way that Japan agreed to supplement its formal reparations under the San Francisco Peace Treaty (as explained above), Japan and several Asian countries negotiated gratuitous economic aid and/or credit. Some renounced their claims to formal reparations, and others were not parties to the San Francisco Peace Treaty. As these were “provided in the spirit of reparations, they were called ‘quasi-reparations’ in Japan.”¹⁹⁹ The recipient countries and the amounts they received are as follows:²⁰⁰

- Thailand was Japan's ally. Japan granted 9.6 billion yen (about US\$26.7 million²⁰¹) in aid to Thailand when they settled an account of 5.4 billion yen (US\$15 million) during the war.²⁰²

¹⁹⁷ Treaty of Peace with Japan, *supra* note 79, Art. 16.

¹⁹⁸ TSUKAMOTO, *supra* note 174, at 9, *citing* Heiwa Jōyaku dai 16 jō gimu rikō ni kansuru kōkan kōbun [Exchange of notes concerning fulfillment of the obligation under Article 16 of the Treaty of Peace with Japan], International Committee of the Red Cross and Japan (May 18, 1955) (text not located). One British pound was traded for US\$2.80 between 1949 and 1967 under the Bretton Woods system.

¹⁹⁹ MASAHIRO KAWAI AND SHINJI TAKAGI, JAPAN'S OFFICIAL DEVELOPMENT ASSISTANCE: RECENT ISSUES AND FUTURE DIRECTIONS, Asia Program Working Paper No. 97 at 3 (Amy McCreedy ed., July 2001), *available at* <http://wwics.si.edu/topics/pubs/oda.pdf>.

²⁰⁰ Ministry of Foreign Affairs, Nihon no sengo baishō·jun baishō ichiran [Reparation and quasi-reparation table], Foreign Affairs Blue Paper 1977, Illustration/Table I-9, *available at* http://www.mofa.go.jp/mofaj/gaiko/oda/shiryo/hakusyo/04_hakusho/ODA2004/html/zuhyo/zu010091.htm (last visited Aug. 12, 2008).

²⁰¹ Stated exchange rates for aid to Thailand, Laos, and Cambodia are based on the prevailing exchange rate between 1949-1971 of US\$1.00 = 360 yen.

- Japan provided 1 billion yen (about US\$2.78 million) to Laos through Japanese products and service.²⁰³
- Japan provided 1.5 billion yen (about US\$4.17 million) to Cambodia through Japanese products and service.²⁰⁴
- Japan provided US\$300 million to South Korea through Japanese products and services and US\$200 million in long-term and low-interest loans.²⁰⁵
- Japan gave gratuitous economic aid of 250 million Singapore and Malaysia dollars (about US\$8,167 million) to Singapore and Malaysia after the remains of many Chinese killed during the era of Japanese occupation were found in 1963.²⁰⁶
- Japan also granted aid of 8.5 billion yen (about US\$28.6 million²⁰⁷) for North Vietnam in 1975, and 5 billion yen (about US\$16.8 million) for unified Vietnam in 1976.²⁰⁸

²⁰² Agreement Between Japan and Thailand Concerning Settlement of Special Yen Problem, July 9, 1955, Treaty No. 9 of 1955 (Japan). English text is available on George Washington University's website, at <http://www.gwu.edu/~memory/data/treaties/Thailand.pdf> (in English and Japanese).

²⁰³ Agreement Between Japan and Laos on Economic and Technical Co-operation, Oct. 15, 1958, Treaty No. 2 of 1959 (Japan). The preamble of the Agreement provides (in French):

Le Gouvernement du Japon et le Gouvernement Royal du Laos,
Considerant que le Laos a renonce a toutes ses demandes en matiere de reparation contre le Japon et que le Laos a exprime le desir de voir le Japon lui accorder une aide economique et technique pour le developpement economique du Laos, sont convenus de conclure le present Accord de cooperation economique et technique tel qu'il est expose en les articles ci-apres.

²⁰⁴ Agreement Between Japan and Cambodia on Economic and Technical Co-operation, Mar. 2, 1959, Treaty No. 16 of 1959 (Japan). Its preamble stated (in French):

Le Gouvernement du Japon et le Gouvernement Royal du Cambodge, Desireux de renforcer les relations amicales entre les deux pays,
relations marquees par la renonciation spontanee du Cambodge aux reparations de guerre et par la signature du Traite d'Amitie entre le Japon et le Cambodge de 1955, et d'elargir leur cooperation economique et technique mutuelle.

²⁰⁵ Agreement on the Settlement of Problem Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, Treaty No. 27 of 1965 (Japan).

²⁰⁶ Agreement of 21st September, 1967, Between Japan and the Republic of Singapore, Sept. 21, 1967, Treaty No. 2 of 1968 (Japan), available at <http://www.gwu.edu/~memory/data/treaties/Singapore.pdf> (in English and Japanese). Agreement of 21st September, 1967, Between Japan and Malaysia, Sept. 21, 1967, Treaty No. 3 of 1968 (Japan), available at <http://www.gwu.edu/~memory/data/treaties/Malaysia.pdf> (in English and Japanese).

²⁰⁷ Stated exchange rates for North Vietnam and unified Vietnam are based on the prevailing exchange rate from 1975 to 1976 of US\$1.00 = approximately 297 yen. Bank of Japan, *Gaikoku kawase soba jokyō* [state of foreign exchange rates], http://www.boj.or.jp/type/stat/dlong/fin_stat/rate/index.htm#forex (last visited Sept. 17, 2008).

- Japan and Mongolia agreed on gratuitous economic aid of 5 billion yen (about US\$18.7 million) from Japan in 1977.²⁰⁹

D. Other Settlements

Japan paid US\$10 million to the Netherlands in accordance with their negotiations during the San Francisco Peace Treaty conference.²¹⁰ In the Micronesia agreement, Japan and the United States, “desirous of expressing their common sympathy for the suffering caused by the hostilities of the Second World War to the inhabitants of the Pacific Islands,” funded US\$5 million each for Micronesia.²¹¹ Japan also had various agreements on settlements of claims with other countries.²¹² Switzerland, Spain, and Sweden did not declare war against Japan, therefore they were not parties to the San Francisco Peace Treaty and did not waive claims. France, Denmark, Italy, the U.K., and others had claims that arose before the war, which were expressly excluded from waiver by the San Francisco Peace Treaty.²¹³

E. China

Japan gave the PRC a large amount of aid (3,133 billion yen in credit, 146 billion yen in gratuitous economic aid, 145 billion yen in technical co-operation, and 2,284 billion yen in financing through the Japan Bank for International Cooperation) since 1979.²¹⁴ It is said that such types of aid are an implicit substitute for the reparation that was waived by the PRC. In fact, Chinese Foreign Minister, Jiaxuan Tang said Japan’s official development assistance (ODA) substituted for war reparation at the press conference at the Japan Press Club in May

²⁰⁸ See TSUKAMOTO, *supra* note 174, at 8. The text of the agreement itself was not located.

²⁰⁹ Agreement Between Japan and The Mongolian People’s Republic on Economic Cooperation, Mar 17, 1977, Treaty No. 10 of 1977 (Japan). The preamble of the agreement provided: “[I]t was then confirmed that there was no outstanding problem to be solved between the two countries arising out of the situations which had existed.” The stated exchange rate for Mongolia is based on the prevailing exchange rate in 1977 of US\$1.00 = approximately 268 yen. Bank of Japan, *supra* note 207.

²¹⁰ Protocol between the Government of Japan and the Government of the Kingdom of the Netherlands Relating to Settlement of the Problem Concerning Certain Types of Private Claims of Netherlands Nationals, *supra* note 137.

²¹¹ Agreement Between Japan and The United States of America Concerning The Trust Territory of The Pacific Islands, U.S.-Japan, Apr. 18, 1969, preamble, 20 UST 2654, Treaty No. 5 of 1969 (Japan). The parties settled claims and dispositions concerning Japanese assets at the same time.

²¹² See TAKASHI TSUKAMOTO, SENGU HOSHŌ MONDAI – SŌRON 1 [POST WAR COMPENSATION ISSUES – GENERAL ISSUES 2], Issue Brief 229, 2-3 (National Diet Library, Nov. 2, 1993).

²¹³ Treaty of Peace with Japan, *supra* note 79, Art. 18.

²¹⁴ MINISTRY OF FOREIGN AFFAIRS, TAI CHŪ ODA JISSEKI GAIYŌ [SUMMARY OF ODA FOR CHINA] <http://www.mofa.go.jp/mofaj/gaiko/oda/data/chiiki/china.html> (last visited Aug. 7, 2008).

2000.²¹⁵ However, such types of aid are officially irrelevant to reparation because the agreements, which they were based on, did not mention such implications.²¹⁶

IX. Japanese POWs

Not only Allied POWs were abused. There were also many recorded instances of abuse of Japanese POWs by the Allied countries. There is no known lawsuit in any jurisdiction filed by Japanese demanding compensation based on such abuse; if Japanese former POWs/detainees were to sue an Allied country, they would likely encounter legal difficulties similar to those encountered by Allied POWs when they sued Japan and Japanese companies.

Instead, Japanese POWs/detainees in Siberia sued the Japanese government. The greater part of abuses against Japanese POWs were perpetrated by the Soviet Union. Although the Soviet Union had a non-aggression pact with Japan,²¹⁷ it declared war on Japan at the very last stage of WWII, on August 8, 1945, between the atomic bombings of Hiroshima and Nagasaki by the United States.²¹⁸ Soviet troops advanced to northeast China, northern Korea, and other areas, and attacked Japanese troops. On August 14, 1945, Japan accepted unconditional surrender and subsequently ordered its military to suspend hostilities.²¹⁹ The Soviet Union detained more than 594,000 Japanese for forced labor after the surrender of Japan. Most of those detainees were taken to camps in Siberia. The Soviet Union found that, in the course of their war-time detention by Japan, 46,082 of its detainees died.²²⁰ On the other hand, the Japanese determined that the Soviet Union detained approximately 700,000 Japanese, of which at least 60,000 died during internment under extremely harsh conditions, while many others were seriously injured.²²¹ Although almost all Japanese POWs who were detained by other Allied Powers returned to Japan by 1946, the return of Japanese detainees in the Soviet Union was not completed until

²¹⁵ Tsuneo Sugishita, *Tai chu enjo hodo de kangaeru koto* [What I thought about press releases on economic assistance for China], JICA WEB MAGAZINE, May 26, 2000, <http://www.jica.go.jp/jicapark/odajournalist/02.html>.

²¹⁶ Shin-ichi Nishimura's (Ministry of Foreign Affairs official) Statement, GYOSEI KANSHI IIN KAIGI ROKU [GOVERNMENT MONITORING COMMITTEE MINUTES], No. 3 at 2, 162nd Diet Session, House of Councillors (Mar. 28, 2005).

²¹⁷ Pact of Neutrality Between Union of Soviet Socialist Republics and Japan, April 13, 1941, available at <http://www.yale.edu/lawweb/avalon/wwii/s1.htm>.

²¹⁸ *World War Two In the Pacific: Timeline of Events, 1941-1945*, THE HISTORY PLACE, <http://www.historyplace.com/unitedstates/pacificwar/timeline.htm> (last visited Sept. 27, 2008).

²¹⁹ The first instance of Shiberia chōki yokuryū tō hoshō seikyū jiken [Siberia Long-Term Internee Compensation Case], 1329 HANREI JIHŌ 36, 39 (Tokyo Dist. Ct. Apr. 18, 1989).

²²⁰ *Official Statements: Russia, Japanese POWs*, MEMORY AND RECONCILIATION IN THE ASIA-PACIFIC PROJECT (George Washington University, http://www.gwu.edu/~memory/data/government/russia_pow.html) (last visited Sept. 27, 2008). The Statement indicates that the finding regarding the number of Soviet detainee deaths was made prior to the collapse of the Soviet Union. It also recounts post-collapse actions taken by the Russian government with regard to the WWII detainee issue.

²²¹ The first instance of Siberia Long-Term Internee Compensation Case, 1329 HANREI JIHŌ at 42-43.

1950.²²² Japanese POWs held by other Allied Powers received compensation after their return, but POWs held by the Soviet Union could not receive compensation.²²³ Former Japanese detainees in Siberia sued the Japanese Government, demanding compensation based on Articles 66 and 68 of the Third Geneva Convention of 1949, “the rule of compensation by states on which POWs depend,”²²⁴ pursuant to international customary law, and Article 29 of the Constitution, among others.

A. Retroactive Application of the Third Geneva Convention

Japan and the Soviet Union did not ratify the Geneva Convention of 1929.²²⁵ Japan ratified the Third Geneva Convention of 1949 in 1953,²²⁶ the Soviet Union signed it in 1949 and ratified it in 1954.²²⁷ Under Article 66 of the Convention, the POW’s (or detainee’s) own country pays the credit balance owed by the detaining power:

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed by an authorized officer of that Power, showing the credit balance then due to him.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.²²⁸

Article 68 of the Convention provided for a similar compensation scheme, stating:

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or

²²² *Id.* at 44.

²²³ *Id.* at 51-52.

²²⁴ Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (Third Geneva Convention of 1949), Aug. 12, 1949, arts. 66 and 68, 6 UST 3114, 75 UNTS 31.

²²⁵ See International Committee of the Red Cross (ICRC), State parties of Convention relative to the Treatment of Prisoners of War, July 27, 1929, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=305&ps=P> (last visited Sept. 26, 2008).

²²⁶ Third Geneva Convention of 1949, *supra* note 224.

²²⁷ See ICRC, State parties of Geneva Conventions of 12 August 1949, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Sept. 22, 2008).

²²⁸ Article 66 of the Third Geneva Convention is available on the ICRC’s website, at <http://www.icrc.org/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/8d224c45409225d4c12563cd0051affb!OpenDocument> (last visited Sept. 23, 2008).

hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.²²⁹

The Tokyo District Court, the Tokyo High Court, and the Supreme Court denied the retroactive application of the Third Geneva Convention to Japanese internees in Siberia.²³⁰

B. Customary International Law

Concerning the alleged “principle of compensation by a state on which a POW depends,” all three courts also rejected it. As a general rule, they approved the binding effect of international customary law. The Tokyo High Court stated that, international customary law is recognized as established and binding as a rule of international law.²³¹ To be binding, the court stated, “the mere existence of custom or consistent international practices among most countries, including major countries, is not enough. The custom must be accompanied by the *opinio juris*, a belief that the practice is rendered obligatory.”²³² The Tokyo District Court examined written international law at the time and various international practices on payment to POWs, and concluded that international customary law that the plaintiffs alleged existed was not yet established during WWII.²³³ In addition, the Tokyo High Court examined the drafting record of Articles 66 and 68 in order to determine whether they were a codification of then-existing international customary law (the principle of compensation by a state on which a POW depends), as plaintiffs alleged.²³⁴ The result was negative.²³⁵ Even after taking provisions of POW conventions requiring humanitarian treatment of POWs into consideration, the High Court stated, “it is hard to affirm that the principle of compensation to POWs by the state on which

²²⁹ Article 68 of the Third Geneva Convention is available on the ICRC’s website, at <http://www.icrc.org/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/bd17cc8ca98a7e36c12563cd0051b020!OpenDocument> (last visited Sept. 23, 2008).

²³⁰ The first instance of Siberia Long-Term Internee Compensation Case, 1329 HANREIJIHŌ at 43-45; the second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREIJIHŌ 40, 47-9 (Tokyo High Ct., May 3, 1993); and the Supreme Court decision of Siberia Long-Term Internee Compensation Case, 51-3 MINSHŪ 1233, 1236-7 (S. Ct., 1st Petit Bench, Mar. 13, 1997). One of the plaintiffs was held as a convict of war crimes by the Soviet Union until 1956. The conviction was cleared by the Prosecutor’s office of the Soviet Union and his honor was restored in 1991. The Tokyo High Court still denied the retroactive application of the Convention, however, stating that the Convention is applied to a person while he is held as a POW. The plaintiff was not regarded as a POW during his detention. The second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREIJIHŌ at 49.

²³¹ The second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREIJIHŌ, at 50.

²³² The second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREIJIHŌ, at 50 (English translation from *Law of War, Judgment*, 37 JAPANESE ANNUAL OF INTERNATIONAL LAW 129, 134-5 (1994)).

²³³ The first instance of Siberia Long-Term Internee Compensation Case, 1329 HANREIJIHŌ, at 45-52.

²³⁴ The second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREIJIHŌ, at 40

²³⁵ *Id.* at 52.

they depend has already been established as international customary law at the time the appellants were detained in Siberia.²³⁶ The Supreme Court affirmed the lower court's ruling.²³⁷

C. Compensation Under the Constitution

Plaintiffs' claims based on article 29, paragraph 3, of the Constitution were similar to the Seized Properties in Canada case.²³⁸ Japan and the Soviet Union agreed on and issued the Japan-Soviet Joint Declaration in 1956.²³⁹ Similar to the San Francisco Peace Treaty, the Joint Declaration included a provision stating that both countries would waive claims owned by one country, its groups, and its nationals against the other country, its groups, and its nationals.²⁴⁰ The plaintiffs sought compensation from the Japanese government because their compensation claims against the Soviet Union based on international and Soviet law were waived by the government in the Joint Declaration.²⁴¹ The Tokyo District Court and the Tokyo High Court denied the claim for compensation based on Article 29, paragraph 3, of the Constitution, reasoning that: (1) An individual cannot be a subject of international law; therefore, the plaintiffs could not claim compensation from the Soviet Union based on international law; and (2) plaintiffs' claims would not be awarded based on Soviet law under the courts' understanding of that law. Therefore, the plaintiffs could not obtain compensation from the Soviet Union anyway. The Joint Declaration did not make it impossible for the plaintiffs to receive compensation from the Soviet Union.²⁴² Both courts admitted that, in theory, the loss of labor that would have allowed the plaintiffs to earn money for themselves during detention and forced labor without compensation may be regarded as monetary losses and may be the subject of compensation based on Article 29, paragraph 3, of the Constitution. The courts also found that the Soviet Union had intended to use Japanese assets and manpower in Manchuria (Northeast China) to revive its war-exhausted economy during the fight against Germany. The courts, however, decided that the damages that plaintiffs had suffered were "war damages" under an emergency war situation, which all Japanese nationals had suffered, and that such damages were not subject to compensation under the Constitution.²⁴³

²³⁶ *Id.* (English translation from, JAPANESE ANNUAL OF INTERNATIONAL LAW, *supra* note 232, at 138).

²³⁷ Supreme Court Decision of Siberia Long-Term Internee Compensation Case, 51-3 MINSHŪ, at 1237.

²³⁸ For a discussion of the Seized Properties in Canada case, *see* part VI, above.

²³⁹ Japan-Soviet Joint Declaration, Japan-Soviet Union, Oct. 19, 1956, Treaty No. 20 of 1956 (Japan), available at the Northern Territories Issue Association's website, <http://www.hoppou.go.jp/library/document/data/19561019.html>.

²⁴⁰ *Id.*, item 6.

²⁴¹ The first instance of Siberia Long-term Internee Compensation Case, 1329 HANREI JIHŌ, at 56.

²⁴² *Id.* at 56-57; the second instance of Siberia Long-term Internee Compensation Case, 1466 HANREI JIHŌ, at 46.

²⁴³ The first instance of Siberia Long-term Internee Compensation Case, 1329 HANREI JIHŌ, at 58; and the second instance of Siberia Long-term Internee Compensation Case, 1466 HANREI JIHŌ, at 47.

The Supreme Court reached the same conclusion as the lower courts with regard to claims based on article 29, paragraph 3, of the Constitution. The Supreme Court did not decide whether the detainees could receive compensation based on Soviet or international law. The Supreme Court admitted, however, that if the plaintiffs had effective claims against the Soviet Union, the Declaration made it impossible for them to demand compensation.²⁴⁴ Still, the Court decided that the damages the plaintiffs suffered were “war damages” that resulted from losing the war, and war damages are not subject to compensation under Article 29, paragraph 3, of the Constitution. The Supreme Court regarded the situation that existed when Japan agreed to the Joint Declaration the same as that which existed when the San Francisco Peace Treaty was concluded. Technically, there was a difference in Japan’s legal status when the Peace Treaty and the Joint Declaration were concluded. The Joint Declaration was adopted when Japan was independent, three years after the end of the Allied Occupation. The Peace Treaty was concluded when Japan was not independent and was under Allied Occupation. The Supreme Court stated that the Joint Declaration was issued as a part of the overall war settlement, the same as the San Francisco Peace Treaty. Though Japan was independent, Japan was not in a position to deviate from the terms of the Peace Treaty. Therefore, it could not be helped in the situation and such damages were beyond the scope of compensation under Article 29, paragraph 3, of the Constitution.²⁴⁵

D. Judicial Judgment v. Legislature’s Judgment

Though all three courts denied compensation for the plaintiffs, they were sympathetic to the plaintiffs’ grave suffering.²⁴⁶ The Tokyo District Court and the Supreme Court explained the reason that they could not help the plaintiffs, stating that compensation is a matter of the legislature’s judgment, which is better suited to consider overall factors, such as the national budget, the nation’s economy, and other people’s suffering.²⁴⁷

X. Conclusion

The war compensation issue involves many legal theories. The Japanese Supreme Court has denied compensation for individuals because the relevant treaties settled individuals’ claims. Reparation and compensation for the damages caused by WWII were settled by the San Francisco Peace Treaty and other bilateral treaties. The Japanese Supreme Court has also denied Japanese individuals’ demands for compensation under the name of war damages. This approach may seem unreasonable from the perspective of protecting individuals’ rights, especially human rights. However, as the Supreme Court stated in the Siberia long-term internee

²⁴⁴ Mariko Watabiki, *Saikō saibansho hanrei kaisetsu* 18, 52-3 HŌSŌ JIHŌ 863, 886, and note 3.

²⁴⁵ Supreme Court Decision of Siberia Long-term Internee Compensation Case, 51-3 MINSHŪ, at 1237-39.

²⁴⁶ The first instance of Siberia Long-term Internee Compensation Case, 1329 HANREI JIHŌ, at 58; the second instance of Siberia Long-Term Internee Compensation Case, 1466 HANREI JIHŌ, at 54; and Supreme Court Decision of Siberia Long-Term Internee Compensation Case, 51-3 MINSHŪ, at 1237-38.

²⁴⁷ The first instance of Siberia Long-Term Internee Compensation Case, 1329 HANREI JIHŌ, at 58; and Supreme Court Decision of Siberia Long-Term Internee Compensation Case, 51-3 MINSHŪ, at 1239-40.

compensation case, settlement of war compensation requires consideration of various factors beyond a particular person's case, such as the policies on economic recovery of the countries involved, the national budget, the nation's economy, and equality of compensation for other people's sufferings.²⁴⁸ The parliament is better suited to examine these overarching considerations and to decide comprehensive policy. The Japanese Supreme Court has at least been legally consistent, treating Japanese and foreigners equally.

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²⁴⁸ Supreme Court Decision of Siberia Long-Term Internee Compensation Case, 51-3 MINSHŪ, at 1237-38.