case the plaintiffs are obliged to stand by for the alarm in the designated room and in reality they are not completely relieved from work as the Court found. For this reason the business character of the sleeping hours is obvious, and the hours are considered to be working hours.

In addition, the provisions of the Labor Standards Law regarding working hours, rest periods and rest days do not apply to persons engaged in keeping watch or in intermittent labor, with respect to which the employer obtained approval from the administrative office. Also there is special provision for exemption where a regular worker is lodged and placed on daytime duty while performing his or her regular job. In this case, although these exemptions were available to the defendant, he did not obtain approval from the administrative office.

Prof. KAZUHISA NAKAYAMA
YOICHI MOTOHISA

8. International Law

1. A case in which it was held that the provisions of the International Covenant on Economic, Social, and Cultural Rights of December 16, 1966 and the International Covenant on Civil and Political Rights of December 16, 1966 were not directly applicable among private persons, and they did not create any duties to act which give rise to State liability for compensation as provided by Article 1(1) of the Law concerning State Liability for Compensation.

Decision by the Seventeenth Division of the Osaka District Court on June 18, 1993. Case No. (*wa*) 3122 of 1989. A case requesting the declaratory judgment of lease etc. 1468 *Hanrei Jihō* 122.

[Reference: International Covenant on Economic, Social and Cultural Rights of December 16, 1966, Articles 2(2) and 11(1): International Covenant on Civil and Political Rights of December 16, 1966,

Articles 2, 12(1) and 26; Civil Code, Articles 90 and 709; Law concerning State Liability for Compensation, Article 1.]

[Facts]

X (plaintiff) has the right of permanent residence in Japan based on the Agreement on the Legal Status and the Treatment of Nationals of the Republic of Korea Residing in Japan between Japan and the Republic of Korea signed on June 22, 1965. He agreed on the lease of a condominium with real estate agency Y2 and paid earnest money. Y2 gave notice of the offer of the lease to the owner Y1 through another real estate agency Y3. Y1 rejected the agreement. Before Y1 began to look for tenants, Y1 consulted the real estate agencies Y2, Y3 and Y4 and decided the conditions of the lease. The conditions of the lease included a certain minimum level of income and a clause providing that "in principle tenants should be Japanese nationals." And the presentation of a copy of the tenants' Register of Residence was requested. X brought an action demanding a declaration of lease and delivery of the condominium against Y1. And he also brought an action for damages against Y1, Y2, Y3 and Y4 for the reason that he was disallowed from moving into the condominium because of his nationality and such rejection constituted a racial discrimination. It was submitted by the plaintiff that the making of the discriminative conditions of the lease and the rejection of his moving into the condominium by the owner and agencies constituted torts. Moreover, he claimed damages against Osaka Prefecture (Y5) for the violation of the duty of inspection and regulation.

The plaintiff's claims concerning international law are as follows:

(1) As to the tort of the owner and the agencies.

Since the fundamental right of housing is based on Articles 2(2) and 11(1) of the International Covenant on Economic, Social, and Cultural Rights of December 16, 1966, and Articles 2(1), 12(1) and 26 of the International Covenant on Civil and Political Rights of December 16, 1966 and Japan ratified these Covenants, the right of housing has a normativity as public policy among private persons. Therefore, owners and real estate agencies have a duty of care not to injure this right. When the right of housing is injured by an act

of racial discrimination, such an act constitutes a tort, violating public policy, even when the freedom of contract exists. The acts of the defendants, such as rejection of his tenancy of the condominium etc., injured the plaintiff's right of housing, and did damages to him. They were wrongful since they violated public policy as provided by Article 90 of the Civil Code. They constituted torts.

(2) As to Osaka Prefecture's liability for compensation.

Although the Governor of Osaka Prefecture has duties to inspect and regulate real estate agencies and to enlighten owners of real estate, he failed to do so. Since the omission of the Govornor caused damages to the plaintiff, he was liable for compensation by Article 1 of the Law concerning State Liability for Compensation.

Against these claims, Y1, Y2, Y3 and Y4 asserted that the establishment of the condition of tenant did not constitute a discrimination against Koreans residing in Japan, that the determination of tenancy conditions and the selection of the tenant could be freely made, and that they refused X's tenancy only because of doubt about X's ability to pay the rent. Concerning the liability of Y5, Y5 contended that the Covenants did not have any provisions that could be the basis of a duty to act, which is the requirement for the application of Article 1 of the Law concerning State Liability for Compensation. Therefore, the Governor did not have such duties and he was not liable for compensation.

[Opinions of the Court]

The court held that the owner and agencies were liable for damages because they breached the duties derived from the principle of good faith. The other claims made by X were denied.

As to X's claim (1), the court found that Y1, Y2, Y3 and Y4 did not allow X to move into the condominium not because they doubted X's ability of payment, but because X was a Korean. However, concerning the application of the Covenants, the court held that "the provisions of the Covenants could function as sources of law which have an internal effect only in so far as they request the organ of the State or local bodies to take legislative and administrative measures according with their object, and they did not have any direct

effects among private persons. For those reasons, the claims made by the plaintiff cannot be recognized."

As to (2), the court also referred to the applicability of the Covenants. According to the court, "the Constitution, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights to which the plaintiff referred are not intended to be applied to legal relations among private persons. They are indirectly applied through each provision of substantive private law, or they give standards of general guidance for the legislation. Thus, they do not directly provide particular duties to act to individual nationals. So the Constitution and the Covenants above mentioned do not include any provision that can be the authority for the Governor of Osaka Prefecture's power of inspection and regulation."

[Comment]

In recent years, the number of cases in which provisions of the Covenants are referred to has increased. In Japan, it is generally accepted that by Article 98 of the Constitution the treaties are generally accepted and have internal effects without transformation. But it can be questioned whether the treaties and their privisions are directly applicable or self-executing. There is a controversy about whether the concept of direct applicability and that of self-execution are the same or not. The Tokyo District Court referred to the concept of self-execution in considering the question of the self-executing character of customary international law. According to a decision by the Tokyo District Court on April 18, 1989, "the concept of self-execution signified that domestic courts or administrative organs can decide the legal relationship between private citizens by directly applying international law, that is, without taking specific measures such as the implementing or incorporating of rules of international law into domestic law. Or it means that the laws and regulations of international law are sufficiently clear and detailed for them to be applied directly as domestic law, without making it necessary for domestic executing organs to judge the contents of such laws and regulations in each individual case." (32 *Japanese Annual of Inter-*

national Law 140 (1989)) It can be said that the court did not make a distinction between the concept of direct applicability and that of self-execution.

As to the applicability of the Covenants, the precedents have gradually increased. For example, in the decision by the Osaka High Court on December 19, 1984, it was held that "the International Covenant on Economic, Social, and Cultural Rights is a treaty of the kind that needs legislative measures to implement its contents, and cannot be a law to be applied by the Court." (35 *Gyōshū* 2271.) There are several cases in which decisions were made by applying the Covenants, though the courts did not find them to be breached. As an instance, on August 23, 1985, the Fukuoka District Court held that the fingerprinting system did not violate Article 26 of the International Covenant on Civil and Political Rights. (56 *Hanrei Taimuzu* 199.)

In the present case, the issues are the applicability of the provisions of the Covenants and their validity as standards of illegality in the Law concerning State Liability for Compensation.

Plaintiff's claim (1) can be understood as that he requested an indirect application of the Covenants in the interpretation of Articles 90 and 709 of the Civil Code. On the contrary, the court seems to deny the direct effect of the Covenants among private persons categorically. It is said that the distinction between the direct application of a treaty and its indirect application may be made. Even if the direct effect is denied, it is possible to think that there is still room for indirect applicability. On this point the court in this case expressed no clear opinion.

As to the claim of State liability for compensation, the court held as a general rule that the failure to exercise the power of inspection and regulation would give rise to that liability for compensation to a third party which is provided by the Law concerning State Liability for Compensation: when the provisions which authorise the power were intended to protect the interest of the third party directly, individually and particularly; and when they imposed the duties to exercise that powerf on State or local bodies; and when it was found, all the circumstances taken into consideration, that it was quite un-

reasonable not to exercise the power. Following this theory, the court gave two reasons why the Covenants did not impose particular duties to act on the nationals: (a) they are not intended to be applied to legal relations among private persons and are indirectly applied through each provision of substantive private law; (b) they only give standards of general guidance for the legislation. It is not clear whether reason (a) is of any importance in deciding the existence of public authorities' duty to act. As to (b), more detailed reasoning would be necessary if that conclusion were to be derived from an interpretation of the Covenants. And if this is regarded as a general theory, its relation with the precedent which recognized the direct applicability of Article 26 of the International Covenant on Civil and Political Rights is questioned.

This is the first case on the issues above-mentioned and it is remarkable. However, it is hoped that the argument will be developed by considering the question what kind of duties are imposed on the state by the provisions which the plaintiff claimed to apply, and further, it is necessary to consider the question not generally or categorically, but by an interpretation of each provision.

Prof. TOKUSHIRO OHATA
MEGUMI SUZUKI

2. A case concerning claims for compensation for detention in Siberia by former Japanese detainees.

Decision by the Sixteenth Civil Division of the Tokyo High Court on March 5, 1993. Case No. (*ne*) 1556 of 1989. 1466 *Hanrei Jihō* 40, 811 *Hanrei Taimuzu* 76.

[Facts]

After the outbreak of war between the Soviet Union and Japan in August 1945 and the Soviet advance into northeastern China, 600,000 Japanese soldiers who were stationed there were taken prisoner by the Soviet forces and detained in camps in Siberia after the Second World War. There they were compelled to build railroads and to lumber trees. It is said that 60,000 of them were killed by the

severe conditions. The plaintiffs who are former detainees in Siberia claimed compensation for the enforced labor, for the injuries and handicaps caused by it, and for personal possessions and money which were confiscated but not returned during the detention, based on Articles 3, 66, and 68 of the Geneva Convention, the common international law concerning compensation for prisoners of war, Article 29 of the Japanese Constitution, and Law concerning State Liability for Compensation.

The Tokyo District Court dismissed their claims on April 18, 1989. 40 of the plaintiffs added to the original claims further claims for compensation against the Japanese government on the ground that it defaulted in paying the wages due to them, and filed a *kōoso* appeal to the Tokyo High Court.

[Opinions of the Court]

Kōso appeal dismissed.

Considering changes in international laws concerning prisoners of war, it is thought that the Geneva Convention was established in order to rectify imperfections in the existing laws on prisoners of war, not in order to apply the results to the Second World War retroactively. Article 141 about the coming into effect of the Geneva Convention after its ratification of was established not to apply to the results of the Second World War but to shorten the normal term, six months in Article 138, in the light of the emergency of the situation. So apart from the special provisions in the Geneva Convention, its articles do not apply to this case.

Considering the history of the discussion by the Red Cross International Committee which took part in producing Articles 66 and 68, it is unlikely that they should become common laws or should be enforced with conviction in the laws of the countries concerned. And it is also difficult to admit that the institutions for the compensation of prisoners of war of the home country were established when the plaintiffs were detained in Siberia.

To consider the standard of judgment as to whether international laws can apply or not in Japan, naturally the intentions of the countries which concluded the treaty are very important, and the con-

tents of the treaty must be clear. It is necessary to take coordination of the treaty with those institutions into consideration, especially when the treaty imposes intentional duties on the countries concerned or when similar institutions already exist. So the contents of the treaty must be clearer. Since the contents of common international laws usually are general and abstract and a large part of them confers and imposes rights and duties between states in many cases, it is rare to argue their applicability to domestic situations. So we cannot help denying the applicability of the treaty where substantive requisites for rights come into existence, continue to exist or are nullified, and without procedural requisites to exercise those rights and where there is no rule for coordinating the treaty with the details of exsiting domestic laws. In the light of the above conditions, we considered the appliability of the rules on compensation for the prisoners of war of the home country to the domestic situations, with the result that we cannot help concluding that the claims for compensation based on the rules are groundless, because the objects, contents and methods of the compensation are not clear.

Damages by war should be regarded as damages resulting from the emergency of the war in which all the people of one state take part more or less. In this light, it is not too much to say that the damages should be shared equally among all people of the state. So the damages by war are not objects of compensation by the government. Concerning the damages the detainees suffered during their detention in Siberia, they cannot claim compensation for them against the Japanese Government under Article 29 of the Constitution of Japan, as the relinguishmemnt of such claims by the Japanese Government was issued in the Japan and Soviet Joint Statement as a part of the settlement of the Second World War.

Japan had been under the occupation by the Allies, and did not have the standing or the rights of an independent state under the Allied Occupation from the acceptance of the Potsdam Declaration to the conclusion of the Peace Treaty with the Allies. And concerning the settlement of unpaid wages for prisoners of war, the Japanese Government settled unpaid wages only with former prisoners who had certificates of their income as prisoners of war in accord with

the orders of the countries which detained the Japanese soldiers. Therefore the Japanese Government does not have a duty to pay under international law except in the above cases.

[Comment]

In this case there are various issues. But, we will consider only three points, which seem to be main points in this case.

1. On the issue of whether or not compensation by the government for its own prisoners of war detained in other countries are common laws.

There are opposing opinions on this issue. In order to establish one international common law, generally, there must be habitual practices and the legal conviction that they are rules which have legal effect. In this case, the Court considers them as standards for its establishment. But according to the judgments in PCIJ or ICJ, if a particular rule is not held to be common international law, the two above requisites are more strictly applied. On the other hand, for a common international law to exist, the dominating theory is applied, in which theory a condition of universality of the rule is relaxed, and the legal convictions do not assume an important role. Therefore, the attitudes of ICJ accompany some aspects of law-making. In the light of the way in which the ICJ judge one rule to be common international law, the judgment in this case seems to be a little too passive and conservative.

2. On the issue of whether or not international laws have effects inside states, and whether or not they have applicability in the domestic courts.

The judgment insists not only that the intentions of the countries which conclude the treaty are important but also that the contents of the rules must be definitive. But in this court opinion the issue of the domestic effects of international laws is strictly confined to direct applications in the administration of justice. Therefore in it the meanings of the domestic effects and the relation of them with direct applications are hardly considered. The legislation can choose between making domestic laws and direct application in fulfilling the treaty domestically. But they must choose one of them. So, it is neces-

sary to consider not only the consitions mentioned in this judgment but also whether domestic law-making is carried out, and how the administration decides whether international laws can apply directly or not. And the domestic effects of common international laws demand observance in the form of restriction of domestic law-making and regulations of administration activities and so on. Furthermore, common international laws are usually discussed on the basis of multilateral treaties. In that sense they are not common laws. Accordingly, it will be wrong to consider that common laws are generally abstract and have only small applicability domestically.

3. Legal effects of the occupation

In this judgment it was found that owing to the Allied Occupation, the detainees in Siberia were left unpaid while detainees in other countries were paid and that this was not intentional. But it will be important to rethink the legal effects of the Occupation. Such justification can apply best in the case where the government restricts the rights of its people under occupation policies. On the other hand in this case discriminative treatment occurred because the government of Japan paid compensation only to certain groups of detainees in obedience to the occupation policy. On the estimation of the Japanese Government, the fact that Japan accepted the Geneva Conventions spontaneously will have important meanins. This issue must be considered not only from the point of view of strict legal treatment but also from that of the human rights.

Prof. TOKUSHIRO OHATA
ICHIRO MIURA