

and management, since working conditions are being determined personally and styles of working have become varied. That is to say, it should be noticed that the real ground supporting the Court's view has been shifting gradually. It must be our future task to create a rule of changing the working conditions on the basis of not ignoring the will of each worker.

YOICHI SHIMADA
SHINO NAITO

8. International Law

Matsue Branch of Hiroshima High Court, September 11, 1998

Japan v. Kim Sun-Ki

1956 HANREI JIHŌ 56

Japan has control and jurisdiction over fishing boats of the Republic of Korea (hereinafter referred to as "Korea") in a newly established territorial sea area, irrespective of the existence of the Agreement on Fisheries between Japan and Korea of 1965 (hereinafter referred to as the "Fisheries Agreement").

Reference:

Law on the Regulation of Fishing Activities by Foreigners, art. 3, no. 1 and art. 9, para. 1, no. 1; Law on the Territorial Sea and the Contiguous Zone, art. 2; Agreement on Fisheries between Japan and the Republic of Korea, art. 1, para. 1 and art. 4, para. 1; United Nations Convention on the Law of the Sea, art. 7.

Facts:

The Defendant, Kim Sun-ki, is a Korean national. He is captain of a 68-ton Korean fishing boat, *Daedong-ho No. 909*, which was fishing for sea eels in the Sea of Japan off Hamada in Shimane Prefecture. On June 9, 1997, the Japanese authorities seized the boat for hav-

ing allegedly been engaged in fishing activities prohibited by the Law on the Regulation of Fishing Activities by Foreigners. The area where he was conducting fishing activities is beyond Japan's 12-mile exclusive fishing zone recognized by the Fisheries Agreement. It lies, however, within the area which has been incorporated into the territorial sea of Japan as a consequence of the straight baseline system which Japan established pursuant to the new Law on the Territorial Sea and the Contiguous Zone and its Enforcement Order of 1996 (hereinafter referred to as the "New Territorial Sea Law"). This new law, adopted when Japan ratified the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS"), amended the 1977 law on the same subject.

The Fisheries Agreement provides *inter alia* that in a case where either of the contracting parties employs straight baselines for measuring the outer limits of its fishery zone, such baselines shall be determined upon consultation with the other party (Art. 1, para. 1) and that enforcement jurisdiction in the waters outside the 12-mile fishery zones shall be exercised only by the party to which the fishing vessel belongs (Art. 4, para. 1).

While the Prosecutors had sought the Defendant's conviction, a sentence of six months in prison and a fine of ¥1.2 million, the Hamada Branch of Matsue District Court (hereinafter referred to as the "District Court") ruled that, because of the restrictions imposed upon both parties by the Fisheries Agreement, Japan had no competence to prosecute the Defendant or any other Korean fishermen operating in the newly expanded areas of the Japanese territorial sea, and accordingly the charge against the Defendant had to be dismissed. The Prosecutors immediately appealed the judgment to the Matsue Branch of Hiroshima High Court (hereinafter referred to as the "High Court") on their belief that the District Court had erred in the interpretation of the relevant provisions of the Fisheries Agreement. The present case is *Kōso*-appeal.

Opinion:

Reversed and Remanded.

The area at issue in the present case has become part of Japan's territorial sea since 1997, and consequently Japan exercises jurisdiction over the area.

In international law, an exclusive fishery zone is a zone which may be established beyond the outer limits of the territorial sea. The former therefore cannot be established within the latter. Although a fishery zone imposes certain restrictions on the ocean concerned with respect to its legal status as the high seas, it never does so with regard to the territorial sea.

If so, what the Fisheries Agreement intended to regulate with respect to the fishery zone must relate to the high sea, and not to the territorial sea. No interpretation therefore is possible that art. 1, para. 1 of the Fisheries Agreement intends to limit the exercise by Japan of its sovereignty over its territorial sea.

After the establishment of the fishery zone, Japan extended the outer limits of the territorial sea beyond those of the fishery zone. It may be concluded that, insofar as such extension of the territorial sea is in conformity with the relevant rules of international law, the fishery zone for the purpose of the Fisheries Agreement is now subsumed wholly under the newly extended territorial sea. The zone has thus lost its very *raison d'être* and no longer exists.

As for the Defendant's allegation that Japan had failed to fulfill the obligation of prior consultation with Korea in drawing straight base-lines, the argument is wrong because Article 1, paragraph 1 of the Fisheries Agreement merely provides for the process of consultation when the parties extend their fishery zones and it does not apply to the extension of the territorial sea.

For these reasons, the Fisheries Agreement imposes no limitation on Japan's control and jurisdiction in the area in question, and Japan has jurisdiction to adjudicate the present case.

Editorial Note:

The High Court decided to reverse the original judgment and send back to the District Court the case against the Korean Defendant for fishing illegally in an area which has become part of the newly extended Japanese territorial sea. It in reality followed the Nagasaki Dis-

strict Court's judgment of June 24, 1998 which dealt with a similar case. According to the press, a Korean Government official expressed "regret" over the judgment delivered by the High Court. *See* JAPAN TIMES, September 12, 1998, at 2. The Defendant has filed a *Jōkoku*-appeal with the Supreme Court.

There is no doubt that if the area in question is considered to be part of the territorial sea of Japan in accordance with the requirements under Article 7 of UNCLOS, Japan has the sovereign right to regulate fishing activities by foreign vessels and to apply and enforce the Law on the Regulation of Fishing Activities by Foreigners in that area. The key legal issue in the present case is thus simple: is the *general* status of the area as part of the territorial sea enforceable against Korean vessels in light of the *special* bilateral arrangements under the Fisheries Agreement? As the International Court of Justice stated in its judgment in the *Fisheries* case (United Kingdom v. Norway), "[a]lthough it is true that the act of delimitation [of territorial sea] is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation *with regard to other States* depends upon international law." 1951 I.C.J. 116, 132 (Dec. 18) (emphasis added). Thus the point at issue in the present case is whether or not "international law" includes the Fisheries Agreement.

In this respect, the High Court, emphasizing the clear distinction between the territorial sea and the fishery zone and their respective legal natures, found that Japan has control and jurisdiction over a Korean fishing boat in the area which had recently been incorporated into the territorial sea by the New Territorial Sea Law, irrespective of the existence of the Fisheries Agreement regarding the fishery zone. On the other hand, the District Court, taking into account an unreasonable result the strict separation between the two maritime zones might bring about, *i.e.*, a result that the Fisheries Agreement, though still in force between Japan and Korea at the time of its judgment, would become in fact without any legal effect, held that Japan's sovereignty over its territorial sea including the area in question as general law must be restricted by the Fisheries Agreement as special law and is consequently not opposable at least against Korean vessels.

In a sense, the international law problem posed in the present case, i.e., the enforceability of Japan's newly extended territorial sea *vis-à-vis* Korean vessels, might be merely a passing one. The 12-mile exclusive fishery zones system, applicable particularly to Japan and Korea, was actually based on an old-fashioned or transitional regime which has recently been replaced for practically all purposes by the exclusive economic zone regime up to 200 miles under UNCLOS, to which the both States are parties. Despite difficulties involving *inter alia* delimitation of the sea areas surrounding a disputed group of islets in the Sea of Japan, Japan and Korea at last signed a new fisheries agreement that would be in line with the 200-mile exclusive economic zones regime on November 28, 1998, soon after the High Court's judgment was given. It is in this transitional period of transformation from the old system of national jurisdiction zones into the new one that the present dispute occurred. It is therefore safe to say that similar disputes are not likely to occur in the new territorial water of Japan between the two States in the future.

MORITAKA HAYASHI
TAKAHIDE NAGATA

Tokyo District Court, November 30, 1998

Former POWs and Civilian Internees from the Netherlands v.
the Government of Japan
1157 JURISUTO 279 (1999)

Since Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land cannot be interpreted to provide for the rights of an individual who has suffered injuries by acts in violation of the Hague Regulations Respecting the Laws and Customs of War on Land, which are annexed to the Convention, the plaintiffs are not entitled to claim compensation from the state to which the perpetrators of such acts belong

Reference:

The Hague Convention Respecting the Laws and Customs of War on Land, art. 3

Facts:

All the plaintiffs were interned during the Second World War by the Japanese military authorities in prisoner or civilian detainee facilities. They assert that they were victims of “harmful acts”, e.g., forced labor, cruel treatment and serving as “comfort women”. They seek claims from the defendant as compensation for damages suffered through each of such “harmful acts”, on the basis of Article 3 of the Hague Convention and customary international law.

Opinion:

All the claims asserted by the Plaintiffs are dismissed.

Based on the overall gist of the evidence and the oral arguments, the Court finds the existence of the various injuries in fact suffered by the plaintiffs through acts in violation of the relevant rules of international law. Thus the validity of the plaintiffs’ claims rests on the question of whether or not, in the courts of Japan, individuals may bring claims for compensation against the state to which the perpetrator is affiliated, on the basis of Article 3 of the Hague Convention.

Article 3 of the Hague Convention 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.”

In Japan, treaties generally become effective internally upon promulgation (*See* Constitution, art. 98, para. 2). However, in order for a treaty to be the basis of an individual’s claim against the state, the content of the relevant provisions of that treaty must be unquestionably clear, from the standpoints of separation of powers between the judicial and legislative authorities, as well as legal stability.

A treaty is interpreted generally according to the interpretation rules prevailing at the time the treaty enters into force. However in

1910, when the Hague Convention took effect, no general rules concerning methods for interpreting treaties existed. Since then, rules of treaty interpretation have evolved through the Permanent Court of International Justice and the International Court of Justice, and they have subsequently been refined and incorporated into the Vienna Convention on the Law of Treaties. Thus the Hague Convention should be interpreted through the method clarified in the Vienna Convention.

Under Article 31, paragraph 1 of the Vienna Convention, the basic rule of interpretation is the confirmation of "the ordinary meaning" of the terms of the treaty. Article 3 of the Hague Convention provides only for the liability of the belligerent state. Nothing is stipulated as to the method for payment of compensation, nor is there a provision concerning the right of individuals to seek damages.

However, as a supplementary means of interpretation, reference is made in Article 32 of the Vienna Convention to the preparatory work of the treaty concerned. An examination of the drafting process of Article 3 shows that the Article was focused on possible relief for individuals who suffer injuries.

However, no evidence is found in the statements by the delegates from participating states to indicate that the contracting states intended, much less agreed, to draft a provision that would enable individuals to seek compensation directly from the wrongdoing state.

Furthermore, Article 31, paragraph 3 of the Vienna Convention states that, in interpreting a treaty, account shall be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". In the practice of states up to the present day, however, precedents which have held that an individual victim may bring a claim against the wrongdoing state, on the basis of Article 3 of the Hague Convention, can hardly be found in domestic courts. Concerning liability under that Article, no existing international agreement allows an individual victim to seek direct monetary compensation in the courts of the wrongdoing state.

From the foregoing examination, it may be concluded that Article 3 of the Hague Convention is nothing more than a provision which clarifies a state's international liability to compensate a victim nation for violations of the Hague Regulations committed by the former state.

In the courts of Japan, individuals suffering injury from the conduct of members of the armed forces who violate international humanitarian law may not seek compensation from the government of the violator.

The plaintiffs further asserted that by the time of World War II, when the wrongdoing in the present case was committed, the provision of Article 3 of the Hague Convention had already been established as part of customary international law. However, since Article 3 of the Hague Convention may not be used as the basis of the claim in the present case, it is clear that even if such a rule of customary international law has been established, it cannot be used as the basis for the same claim.

Editorial Note:

This decision by the Tokyo District Court and the expert opinions submitted thereto deal with issues relating to compensation for damages and injuries suffered by ex-prisoners of war and civilian detainees from the Allied Powers through acts in violation of the laws of war. Up to the present time, many cases involving claims for damages and injuries suffered by war conduct during the Second World War have been filed with the Japanese courts. A number of cases, among them, have been brought by foreign victims.

The Japanese courts have maintained, since the “Atomic-bomb Case” (also known as the Shimoda Case), decided in 1963, that whether individual victims have the right to claim compensation under international law against the wrongdoing state depends upon whether individuals can be subjects of international law. The courts have further stated that to be considered as subjects of international law, individuals must be able to have rights and assume duties in their own names under international law, which they can only do insofar as they are recognized as such in concrete cases by treaties. Such a viewpoint has been upheld in a series of recent decisions on post-war compensation cases.

Therefore, in the present case, the plaintiffs, the defendant and the District Court boiled the issues down to the question of *jus standi* and an individual person’s right to claim compensation under international law. The main focus was the interpretation of Article 3 of the Hague

Convention. On this point, the plaintiffs submitted expert opinions by three foreign scholars in international law, and the defendant submitted another by a Japanese scholar. Among the former, Professor F. Kalshoven testified before the Court. It is pointed out that this was the first time in history for a Japanese court to receive live testimony from a foreign expert.

The opinions of the three foreign experts all argue for the existence of an individual person's right to claim compensation on the basis of Article 3 of the Hague Convention. Professor Kalshoven analyzes this point in detail. He argues that the purpose of the Article has been from the outset to reaffirm the pre-existing customary rule of responsibility of a belligerent state for all acts committed by members of its armed forces in violation of the law of war, and that any such violation renders the belligerent party concerned liable to pay compensation to the individual victims of the violations. He indicates that evidence for this is found in the drafting history of Article 3. The opinion of the other two (E. David and C. Greenwood) supported fully the analysis and conclusion of the Kalshoven opinion.

On the other hand, the expert opinion on the part of the defendant by Professor A. Kotera argues that the principle of state responsibility under international law provides that in cases where a national of a state suffers personal or property damage by an act of another state in violation of obligation under international law, the damage is considered those of the state to which the national belongs, and not of the individual national, and it is the state that can claim compensation for the damage.

The Tokyo District Court endorsed Professor Kotera's expert opinion and denied the right of individual persons to claim compensation. The plaintiffs have appealed from the decision and the case is pending at one of the divisions of the Tokyo Appellate Court.

MORITAKA HAYASHI
HIROYUKI BANZAI