

404).

The Supreme Court also concluded that X_1 and X_2 were unfairly blamed in the determination of the amount to be compensated. This is also very reasonable, as an employer's responsibility in human resource management must not vary according to an employee's living condition, whether he/she lives with his/her family or not.

As stated above, we can agree with this Supreme Court's decision in general. However, we have some concern that an overemphasis on an employer's duty to care for its employees' mental and physical health may conflict with the employees' privacy. With regard to the problem of how an employer respects an employee's privacy under the employer's health-management, a recent judicial decision has held that, "Because the employer has a supplementary obligation under labor contracts to be concerned about the worker's health in the workplace, it should make it a principle to notify the employee that he/she has contracted a disease, unless this is excused by special circumstances. However, where the notification significantly departs from social propriety, it is unlawful" (*HIV Kansensha Kaiko* case, Tokyo District Court, March 30, 1995, 667 RODO HANERI 14). It will be an important matter for discussion in the future to determine to what extent an employer needs to recognize its employees' health conditions.

9. International Law

Tokyo High Court, February 8, 2001

X v. Japan

1224 JURISTO 301 (2002)

Article 3 of the Convention Respecting the Laws and Customs of War on Land (hereinafter referred to as the "Hague Convention") cannot be construed as conferring on individuals the right to claim damages against the wrongdoing State.

Reference:

Convention Respecting the Laws and Customs of War on Land, Article 3.

Facts:

The Plaintiffs in this case are twelve residents of Hong Kong. During World War II, from December 1941 to August 1945, the Japanese Army established a military administration in Hong Kong and issued military bills called *gunpyo* as a currency. Hong Kong residents were forced to exchange Hong Kong dollars into *gunpyo*, and the use of Hong Kong dollars was subsequently banned completely. On the back of each *gunpyo* there was a note stating: "This bill may always be exchanged for Japanese yen of equal value".

On September 6, 1945, shortly after the end of the war, the Supreme Commander for the Allied Powers in Japan issued a memorandum concerning the currency, stating that all *gunpyo* and any other currency issued by Japan in its occupied territories were now null and without value. Pursuant to that memorandum, the Ministry of Finance of Japan announced on September 16, 1945, that the use of *gunpyo* would be prohibited in all transactions. Consequently the *gunpyo* that were in circulation among Hong Kong residents at that time, which amounted to some 1.9 billion yen, became mere scraps of paper.

It is under these circumstances that the Plaintiffs, who owned *gunpyo*, instituted an action against the Government of Japan for damage caused by the latter, basing their claims *inter alia* upon Art. 3 of the Hague Convention which provides that "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation." The Plaintiffs demanded that the Government pay approximately 770 million yen. The sum represents the current value of the yen equivalent to the *gunpyo* that they possessed plus a payment of 10 million yen to each of the Plaintiffs for his mental damage. The Tokyo District Court dismissed the Plaintiffs' claims on June 17, 1999, emphasizing, in the relevant part of its ruling, that Art. 3 of the Hague Convention does not allow individuals to seek redress from a government for their wartime sufferings.

This is a case on appeal from that decision. The causes of the action in the present case are basically the same as those in the lower court case. The Plaintiffs, however, referred, as additional bases for their claims, to (i) the practices of the United Nations Compensation Committee established after the Gulf War, (ii) the policies of the Japanese Imperial Army during the Russo-Japanese war (1904–5), and (iii) the decision of a Greek court involving interpretation of Art. 3 of the Hague Convention.

Opinion:

Plaintiffs' appeal dismissed.

(1) The object, purpose and context of the Hague Convention

The Plaintiffs argue that the Regulations concerning the Laws and Customs of War on Land (hereinafter referred to as the “Hague Regulations”) annexed to the Hague Convention contain many provisions relating directly to the protection of individuals’ legal interests and that the Hague Convention is clearly intended to provide for the protection of the private rights of individuals.

However, since international law governs the relationship between States, subjects of that law are in principle States, and not individuals. In order for individuals to be treated as subjects of international law, therefore, it is necessary that a treaty specifically and expressly confers upon them both substantive rights and some kind of procedural rights in order to realize the former. The Hague Convention, however, contains no such provision. Art. 3 of the Convention must be considered as a provision concerning State responsibility applicable to the relationship between States, and not between injured individuals and the author State.

(2) Subsequent practices

The Plaintiffs referred, as “subsequent practice” within the meaning of Art. 31, para. 3 (b), of the Vienna Convention on the Law of Treaties, to the following three cases.

First, the Plaintiffs argued that the right of the injured persons to claim damages against the wrongdoing State may be supported by the practice of the United Nations Compensation Committee, which was established by Security Council Resolution 687 (1991) after the

Gulf War. According to that resolution, however, it is the government and international organization concerned, and not the individual person concerned, who is entitled to submit claims to the Compensation Committee. The Court accordingly cannot agree with the Plaintiffs' argument.

Second, the Plaintiffs referred, as a practice of compensation made to individuals to the policies that the Japanese Imperial Army adopted during the Russo-Japanese war (1904–5). The Japanese Imperial Army reportedly compensated injured persons for losses that Japanese soldiers might have caused through acts not justified by military necessity. But it is not clear whether the injured persons actually brought claims for damages against the Army and whether the latter responded to the claims in the performance of its duty to do so. The Court is thus unable to consider the said policies as part of State practice which has any bearing on the interpretation of Art. 3 of the Hague Convention.

Finally, the Plaintiffs pointed to the decision of a Greek court which recognized, under Art. 3 of the Hague Convention, compensation for damages caused to individuals by atrocities committed by the German military forces. It is to be noted, however, that the decision itself has not been presented before the Court as an evidence by the Plaintiffs. Furthermore, the Court cannot regard this judgment as part of State practice regarding the interpretation of Art. 3 of the Hague Convention because of the fact that it was rendered in the absence of the German Government as respondent.

(3) *Travaux préparatoires* (drafting process)

The Plaintiffs argue that the drafting process of Art. 3 of the Hague Convention shows that this provision is intended to allow injured persons to claim compensation against the wrongdoing State.

However according to Oppenheim's *International Law*, one of the most widely-used textbooks of international law around the world, individuals were regarded as mere *objects* of international law until 1928, and therefore it was not likely that they had the status as *subjects* of international law at the time of the adoption of the Hague Convention. Bearing this in mind, it is hard to imagine that the drafters discussed the text of Art. 3 on the assumption that it would directly grant individuals an international legal right to claim damages against

the author State.

Editorial Note:

The present case is one of the post-war compensation cases, and as such it concerns the same international law issue as some other cases: under international law, can injured persons claim compensation for the injuries they have suffered against the wrongdoing State? This obviously concerns the interpretation of Art. 3 of the Hague Convention. The starting point of any argument about this question is the fact that while Art. 3 does set out the responsibility of a State whose soldiers committed an act contrary to the Hague Regulations, it does not contain any express provisions concerning *to whom* the responsible State must pay damages.

The Tokyo High Court (hereinafter referred to as the “Court”) took the same approach to this problem as in other similar cases: first, it addressed the question of whether individuals were subjects of international law; and secondly, it took for granted that individuals cannot be subjects of that law unless a certain international procedure was available to them.

Apart from the highly “academic” controversy over the status of individuals in international law, today, more and more domestic cases concern international law issue, and it is no longer uncommon that individuals’ rights and duties under international law are realized through domestic proceedings. Individuals have certainly their own rights and duties under a treaty where such a treaty provides for an international procedure. But the question of whether individuals have substantive rights and duties under international law is one thing, and the existence or otherwise of an international procedure to materialize such rights and duties is quite another. It is sufficient in this respect to recall many cases where offenders having committed acts against certain rules of law of armed conflict are tried at municipal tribunals. In short, if individuals in fact have a substantive right under a treaty, it is possible for them to exercise such a right in domestic proceedings provided that the right in question is of a “self-executing” nature.

So the real issue to be addressed first is whether Art. 3 of the Hague Convention can be interpreted as providing for the substantive

rights of individuals. In the light of the terms and the drafting process of the article, the Court's interpretation seems to be sound at least as one applicable at the time of its adoption in 1907. What about, then, subsequent practices? The Plaintiffs referred to two cases as relevant practices. A few comments on them may therefore be warranted. The Court rejected the Plaintiffs' argument that the UN Security Council Resolution 687 (1991) recognizes the right of injured persons to claim compensation directly from the Iraqi Government on the ground that only governments and international organizations can bring claims to the Compensation Committee in accordance with the terms of the resolution. It should be pointed out, however, that the resolution indeed reaffirms that "*under international law Iraq is responsible for injuries to foreign governments, their nationals and companies.*" [emphasis added] Thus it may be concluded that the Security Council has recognized in broad terms the right of individuals to claim compensation from the Iraqi Government.

As for the decision of the Greek court, the Court merely points out that the decision itself was not presented before the Court as evidence by the Plaintiffs and that it was rendered in the absence of the German Government as respondent. But it is significant that the court found that under Art. 3 of the Hague Convention, claims may be presented not only by the State but also by the plaintiffs in their individual capacity, since doing so was not precluded by any rule of international law (see 92 *American Journal of International Law* (1998), at 767). This decision thus presents the positive views of a Greek court on the broader meaning of Art. 3 of the Hague Convention, though one might reasonably doubt whether it gives a sufficiently convincing interpretation of that article.

Tokyo High Court, December 19, 2001
Case on Restitution of Unjust Enrichment
1224 JURIST 307 (2002)

Facts:

In July 1996, the Plaintiffs (X), wishing to acquire the right of per-

manent residence in the United States of America and responding to a newspaper advertisement recruiting permanent residents placed by the Defendant (Y, being the Republic of the Marshall Islands), concluded with Y an "Agreement on the procedure for the programme of acquiring permanent resident status of the United States" (hereinafter "the Agreement"). Under the terms of the Agreement, X were to acquire the US permanent resident status five years after X had acquired permanent resident status in the Marshall Islands.

In August 1996, as directed by Y, X paid to Y a fee of three million yen required for the procedure. Y, however, only issued short-term tourist visas to X, and no further progress was made on the procedure with regard to permanent residence. After sending, in September, a request for performance of the obligation within an appropriate period, X declared in November that they had terminated the agreement and filed the present action with the Tokyo District Court, claiming the restitution of unjust enrichment from Y.

X claimed that the contract under the Agreement was "a civil law contract between genuinely private persons" based on the relationship of "delegation, quasi-delegation or contract" for acquiring the US permanent resident status, and therefore the principle of jurisdictional immunity would not apply even if Y was a State. In the present appellate proceedings, X further claimed that the central obligation of Y was to provide a real property and facilities necessary for establishing residence in Y's territory, and not the granting of permanent resident status. Furthermore, Y's obligation to return the money upon the termination of the contract due to Y's non-performance would be a purely private law obligation.

The District Court dismissed X's claim on the ground that Japan had no jurisdiction over such public law acts of a foreign State as the granting of permanent residence.

Opinion:

Appeal dismissed.

- (1) Under the terms of the Agreement, X were obligated to pay the sum of ¥3 million to Y in consideration of Y's obligation to grant them permanent residence in the Republic of Marshall Islands un-

der certain conditions, and to enable X to acquire the permanent resident status of the United States five years thereafter. It was therefore expected that X would become eligible for US permanent residence only upon expiry of five years after they had become permanent residents of the Republic. The “central and essential element of the obligations” for Y was thus to grant the permanent resident status of the Republic to X.

- (2) “Various opinions have been put forward regarding the acts of a foreign State to which Japan’s jurisdiction should extend. However, at least in civil law proceedings like the present one, where essentially public law acts of a foreign State such as the granting of permanent resident status are involved, it should be interpreted that Japan cannot extend its jurisdiction unless that State voluntarily accepts it.”
- (3) Since Y has not indicated its willingness to respond to X’s claim, Japan cannot exercise its jurisdiction over the present case.

Editorial Note:

- (1) Japanese courts have long taken the position based on the principle of absolute immunity of jurisdiction. In a classic 1928 decision, the former Supreme Court of Japan (*Taishin-in*) held that “foreign States are not subjected to the jurisdiction of Japan in civil law action except for such special cases as those involving real property.” Recently, however, some lower courts have started to show a certain degree of understanding of the restrictive approach to state immunity. Among others, the Tokyo District Court clearly supported the restrictive approach in a 2000 decision, recognizing its jurisdiction over the issuance of public bonds guaranteed by a foreign government on the basis of the economic nature of the transaction, without the need to examine the nature of the foreign State organ concerned or the purpose for which the bond was issued.
- (2) In the present case, the Court does not indicate whether it has adopted the absolute or restrictive approach to jurisdictional immunity. It is clear, however, that the Court did not support the absolute immunity rule since it actually went into the examination of

the facts alleged by X and the contents of the Agreement. Such an examination of State acts would not be necessary if the Court recognized the absolute nature of jurisdictional immunity.

- (3) On the other hand, it may also be interpreted that the Court did not take side with either the absolute or restrictive approach. For, in response to the Plaintiff's request that the Court should adopt the restrictive approach, the decision stated that "the Court cannot adopt the restrictive approach in the interpretation of civil procedure law... unless it is permitted by treaty provisions or domestic legislation which provide for such approach. "The Court also stated expressly that specific legislation would be needed for the Court to adopt the restrictive approach. Thus, given the fact that no such legislation exists, the possibility is not excluded that in the present case the Court has simply reached the conclusion that the Japanese civil jurisdiction did not apply to the public acts of a foreign State, without relying theoretically on either of the two approaches.
- (4) Certainly the decision is ambiguous on whether or not it adopted the restrictive approach to jurisdictional immunity. However, to place too much emphasis on the above-quoted paragraphs, which are part of its obiter dicta, would result in neglecting the main parts of the decision which make a detailed analysis of the contents of the Agreement. The decision did recognize the existence of the contract between X and Y, and examine its provisions. The concept of public law acts which the Court referred to in its decision is, at least when discussing the question of jurisdictional immunity in international law, something that is contrasted with the concept of private law acts like contracts. It may therefore be concluded that the decision does not exclude the applicability of the restrictive approach.