ipso jure claim, it is necessary to calculate the amount accurately. The reversal of High Court's decision, which includes an incorrect definition of the calculation base, is a matter of course.

Later, on Feb. 24, 2003, Y agreed to pay around 2.9 million yen as claimed by Xs, and this case was settled.

9. International Law

Hiroshima High Court, September 20, 2002

Case concerning a refugee who illegally entered Japan from Afghanistan

1814 HANREI JIHO 161

Reference:

(1) Immigration Control and Refugee Recognition Act, 1951 (ICRRA); (2) Convention Relating to the Status of Refugees, 1951 (Refugee Convention).

Facts:

According to the findings of the original court, the Hiroshima District Court, the accused is an Afghan belonging to the Hazara minority. In the early 1990s, he was active as a member of a Shiite Islamic political party in Kabul, including participation in military activities against the Taliban and Tajik groups. After the latter groups expanded their control over Kabul, he escaped to Pakistan in 1995 and moved to the United Arab Emirates (UAE) in 1997. There he started a trading business and visited Japan legally for business eight times between 1995 and 2000. In 1998 the Taliban captured Mazar-i-Sharif, where his family lived, and killed many Hazara people. In 2001 he returned to Afghanistan to meet his family, and found out that the Taliban had arrested his father in lieu of himself. He then decided to seek asylum in Japan. He left the UAR on May 30 and entered Japan on June 10 with a forged passport via Hong Kong and the Republic of Korea.

On September 12, 2001, he applied for recognition of his status as a refugee under a fictitious name, and again, on November 7, he applied for the same status under his real name, without success on both occasions. He was then prosecuted for illegally entering and staying in Japan.

The original court exempted the accused from penalty on the basis of Article 70-2 of ICRRA, which provides for such exemption upon proof that an accused is a refugee and has "entered Japan directly from a territory which was likely to be harmful to his life, physical being, or physical liberty as prescribed in Article 1, Paragraph A-(2) of the Refugee Convention".

Opinion:

The original judgment is reversed, and the accused is fined 300,000 yen.

(1) Can the accused be considered a "refugee"?

The conclusion of the original court that the accused was a "refugee" is appropriate because his statements are credible and the objective circumstances that had caused him to have the fear of being persecuted did exist.

(2) Did the accused enter Japan "directly from a territory which was likely to be harmful to his life, physical being, or physical liberty"?

Since the UAE has recognized the Taliban regime in Afghanistan and was not a party to the Refugee Convention, the UAE can be regarded as a country in which the accused had no guaranteed protection or safety even if he sought asylum there. Hong Kong and the Republic of Korea were used only for transit purposes en route to Japan. The conclusion of the original court is thus appropriate that he was considered to have entered Japan directly from a territory where no guarantee existed for his protection or safety.

(3) Relationship between the status of the accused as a refugee and his illegal entry

The original court correctly recognized the relationship between the status of the accused as a refugee and his illegal entry into Japan, since it is reasonable that he chose Japan because of his previous visits and experience of business in Japan. His motivation for business and his wish to seek asylum can be considered compatible.

(4) Prompt reporting under Article 70-2 of ICRRA

The evidence submitted shows that the accused knew the requirement that a report on his illegal entry had to be submitted within 60 days. He had sufficient ability and opportunities to do so. It must therefore be concluded that his application for the status as refugee was filed with considerable delay after a reasonable period as required under Article 70-2 of ICRRA had passed.

(5) Conclusion

While the original judgment rightly applied the substantive requirements under Article 70-2 of ICRRA with regard to the refugee status of the accused, it erred in finding that he had submitted a report under that Article without delay.

Editorial Note:

This case involves the question whether the accused fulfilled the requirements of Article 70-2 of ICRRA, and if so, whether he submitted the report "promptly" as required by the proviso of that article. The article is based on Article 31, Paragraph 1, of the Refugee Convention, obliging the contracting states not to impose penalties on refugees on account of their illegal entry and presence. Article 70-2 of ICRRA provides that a person who has illegally entered Japan may be exempted from penalty if the evidence produced shows that ① he is a refugee, ② he entered Japan directly from a territory which was likely to be harmful to his life, physical being, or physical liberty as prescribed in Article 1, Paragraph A-(2) of the Refugee Convention, and ③ the offense was committed because of the likeliness of the preceding item. The article goes on to provide: "However, it will be permitted only when, after having committed the offense, a prompt report was submitted in the presence of an Immigration Inspector corresponding to the [above-mentioned items]".

The Court agreed with the original court in recognizing the status of the accused as a refugee. It is noteworthy that both courts recognized the unusual circumstances in which a potential refugee is placed, including the possibility to submit false documents and to exaggerate the contents of his statements, and attempted to understand the real situation not only on the basis of his statements but also by a thorough analysis of all relevant and objective facts.

It may also be noted that in interpreting the term "entered Japan directly from a territory..." in Article 70-2, both courts followed the 1999 Guidelines adopted by the UNHCR and concluded that it includes the case where a person enters Japan from his country or from another country which is unlikely to guarantee his safety through third countries in a short time without seeking asylum therein. Thus the courts considered Hong Kong and the Republic of Korea as mere transit countries.

This judgment reversed the original one and fined the accused, though it recognized his refugee status. Traditionally, most cases involving the question of refugee status have tended to follow the position of the Minister of Justice. However, some lower courts started to draw their own conclusions on the basis of their detailed examination of the cases (e.g., Tokyo District Court, March 1, 2002, 1774 HANREI JIHO 25). The conclusion of this court is an example of this recent new development in a high court. It is expected that, with the possible amendment of ICRRA, which is being considered by the Government, and a more positive refugee policy in Japan, such new developments will become more pronounced in the near future.

Tokyo High Court, October 11, 2001

X. v. Japan

1749 HANREI JIHO 61; 1072 HANREI TAIMUZU 88

(1) The Hague Convention does not permit individuals to bring claims for war damage against the belligerent State party.

(2) Through Article 14 (b) of the San Francisco Peace Treaty, which provides for the waiver by the Allied Powers of all claims, the claims concerning war damage against Japan and its nationals by the Allied Powers and their nationals have completely extinguished.

Reference:

(1) Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907; (2) Treaty of Peace with Japan, San Francisco, 8 September 1951; (3) Convention (III) relative to

the Treatment of Prisoners of War, Geneva, 12 August 1949.

Facts:

The plaintiffs are eight Dutch nationals who were prisoners of war or civilian internees during World War II in the Dutch territory of East India (now Indonesia) when it was under the occupation of the Japanese army. They alleged that they had suffered severe damage through forced hard labor and abuse in violation of either the Regulations concerning the Laws and Customs of War on Land (hereinafter "Hague Regulations"), annexed to the Convention (IV) respecting the Laws and Customs of War on Land (hereinafter "Hague Convention"), or both the Hague Regulations and the Convention (III) relative to the Treatment of Prisoners of War.

The plaintiffs demanded that the Government of Japan pay damage compensation of US$22,000 to each of them based on Art. 3 of the Hague Convention as well as the rules of customary international law that are embodied in that Article.

The District Court dismissed the claim, stating that Art. 3 of the Hague Convention does not recognize individual's standing. The plaintiff then appealed. In the present proceedings, the Government raised a new point with regard to Art. 14 of the Treaty of Peace with Japan (hereinafter "San Francisco Peace Treaty").

Opinion:

Appeal dismissed.

(1) Article 3 of the Hague Convention.

In the history of international law, a rare case is known that recognized the right of individuals to claim compensation shown by a few provisions of the Versailles Treaty. These were, won by the victorious States through diplomatic negotiations with the defeated countries under the abnormal reality of defeat in war. Thus, even if a pre-war treaty provided for the responsibility of belligerent States, it cannot be considered as recognizing the right of individuals to claim for compensation. Recognition can only be through diplomatic negotiations between the States concerned. This principle naturally applies to the Hague Convention, which provides for responsibility of the States as

belligerent powers before a war actually starts. Thus, Art. 3 of the Hague Convention provides merely for the international responsibility of States which violate the provisions of the Hague Regulations vis-à-vis the injured States.

The plaintiffs argued that the fact that Art. 3 of the Hague Convention uses the term "compensation" implies that the Article envisages claims being brought by individuals.

However, the word "compensation" in international law, in the wide sense, means the entire act of making up for the damage incurred by a victim State from the State that has violated the legal interests of another State contrary to international law. Moreover, it invariably means monetary compensation. Especially, the term "war compensation" is sometimes used to indicate compensation for war damage between the defeated countries and the victorious States. The term "compensate" is also used in such a sense in the San Francisco Peace Treaty and other instruments.

From the above analysis, it cannot be concluded that that Art. 3 of the Hague Convention envisages the right of individuals to bring claims solely because it uses the word "compensation".

(2) Article 14 (b) of the San Francisco Peace Treaty

Art. 14 (b) of the San Francisco Peace Treaty provides that "... 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 the direct military costs of occupation." Through such a waiver of claims, all issues of mutual claims between the Allied Powers and their nationals on the one hand and Japan on the other are considered to have been settled finally. It is reasonable thus to consider that the claims of the nationals of the Allied Powers in their individual capacity have also been "waived" by the Allied Powers, and thereby the substantive claims of the nationals of the Allied Powers have also disappeared.

With regard to the issue of the claims of the Dutch nationals, the record of negotiations between the Japanese and Dutch delegations at San Francisco shows that the issue was settled, with no possibility for

Allied Power nationals to obtain satisfaction for their claims under the Treaty, though it was understood that "certain types of private claims of the Allied Power nationals which the Japanese Government may wish to deal with voluntarily" would remain. Such a waiver of the entire claims, including those of the nationals of the Allied Powers as individuals, was made possible in return for the severe burden imposed on Japan as a result of its defeat to give up not only its overseas territories but also the foreign assets of its normal nationals located in the Allied Powers as well as in China, Taiwan, Korea, etc. Furthermore, Japanese assets located in neutral countries were taken as part of compensation. That measure was also taken in the expectation that Japan would recover and contribute to the international community in the future.

The plaintiffs additionally argued that the San Francisco Peace Treaty uses the word "claim" in a single sense, with no reference to the private claims of individuals, and therefore the "claims of the Allied Powers" which were waived by its Art. 14 (b) mean only the claims of the State concerning private claims of nationals of the Allied Powers. It is true that the word "claim" is understood in general international law as a right that only States can exercise, and not one that individuals can exercise directly against the wrongdoing State. However, from an examination of the usage of the word in Art. 14 (b), as well as the context and other elements, it can be understood as including the private claims of the nationals of the Allied Powers.

For the above-mentioned reasons, the plaintiffs' claims are not admissible under Art. 14 (b) of the San Francisco Peace Treaty.

Editorial Note:

Since Dutch nationals brought this case against the Japanese Government, it is different from the cases involving war compensation that are to be settled between States. The former types of lawsuits have often been brought in recent years, when more than half of a century has passed since the end of World War II. Examples of such court decisions are: Tokyo District Court, November 26, 1998, September 22, 1999 and March 26, 2001; Tokyo High Court, December 6, 2000, February 8, 2001, January 15, 2002 and March 27, 2002; and Osaka District Court, March 27, 2001. All these decisions denied the claims

brought by individuals.

The main issues in the present case relate to the interpretation of Art. 3 of the Hague Convention and Art. 14 (b) of the San Francisco Peace Treaty. I will explain each of them separately.

(1) Art. 3 of the Hague Convention

In this case, the Court held that individuals had no standing on the basis of the Hague Convention. It followed the precedent in the District Court which adopted the same conclusion.

The most crucial point is: whether Art. 3 of the Hague Convention admits the individual's claim. Since Art. 3 does not define any procedural order, these problems has become controversial.

As I already mentioned, the judgment of the Court wholly denies the standpoint of the plaintiff that challenged defendant and the judicial precedents in similar cases. However, as was pointed out in the expert opinion by Yoshio Hirose (Prof. of Meiji University), it can be argued that the remedy in municipal courts concerning the rights provided by treaty is a part of the implementation system of international obligations as a means of "internal remedy" (His expert opinion was reprinted in 69 *Hougaku Kenkyu* (Meiji University)). Prof. Hirose's support of the authority is the fact that Art. 3 of the Hague Convention provides explicitly the responsibility of State of the wrong doer to pay compensation. According to his opinion, it means that Japanese national Courts should ensure the claim for war damage (pp. 189–190). He pointed out, referring to the case of *Jurisdiction of the Courts of Danzig* (1928 PCIJ *Series* B No.15 at 17), that if there is not any explicit provision which denies individual's claim in national courts, the existence of such a claim should be admitted principally, and that the injurious State should have the obligation to ensure such a claim.

In the judgement of the Court, this argument was rejected. One of its reasons was that since a remedy is determined by inter-states treaty through negotiation, the principle of "*injuria* requires a remedy" does not always admitted in international society. The Court decided that even if the individual's right is provided in the treaty, such a mere fact does not mean naturally the individual's standing to seek compensation in national courts. According to the Court, the decision in the Danzig case means

as follows: it is the *special intention* of the high contracting party that admit individual's rights and obligations and ensure the enforcement at the national courts (emphasis added). Therefore, unless such a intention is identificated from the text or *ea teneur générale*, the state party to the treaty is not obliged to admit any claim.

This issue has become popular among those similar cases dealing with the problems of claim of individal. However, denying the claim of individual itself, some cases admitted the existence of injury from ill treatment in a similar context (Tokyo Disrict Court, November 30, 1998). Moreover, one of the most recent cases concerning war compensation has pointed out the Government's "moral resposibility" (Hiroshima District Court, July 9, 2002). Considering these trends, this decision may be criticized because of its reluctance to call the attitude of the Government into question.

(2) Art. 14 of the San Francisco Peace Treaty

With regard to Art. 14 (b) of the San Francisco Peace Treaty, the plaintiffs argued that, since the word "claim" means *international claim*, "the reparations claims of the Allied Powers" which were waived under that Article were nothing but the *claims of States* concerning their nationals' private claims. Moreover, for these reasons, they concluded that Art. 14 (b) does not have the effect of eliminating the claims of individuals recognized under the Hague Convention.

On the other hand, the Japanese Government maintained that the issue had been settled completely and finally since the private claims of individual nationals of the Allied Powers were also waived under Art. 14 (b) of the Peace Treaty. This appears to be a new interpretation of that Article by the Government: In the past the Government held the view that what was waived under that Article was only the State's right of diplomatic protection (Akio Morita, 1246 *Jurist* 267). However, according to the statement of a Government official at the Diet, the Government's view expressed at the Court did not contradict its official position. He explained that what had disappeared under that Article were not the individuals' claims themselves, but the legal duty for States to respond to such claims. In other words, the individuals had certain rights but no remedy was available, and for that reason, remedy had to

be rejected in that case. (Records of the 151st Meeting of the *Committee on Foreign Affairs and Defense*, House of Councilors, March 22, 2001, No. 4, pp. 13–14).

The Court, referring to the drafting history of the San Francisco Peace Treaty produced by the plaintiffs, held that the Treaty had the effect to extinguish all claims of States and their nationals at the international level. Here the Court appears to have adopted a doctrine different from that of "the non-accountability of the State (Kokka-Mutouseki)", which has often been adopted in similar cases that denied the individuals' claims for war damage. According to the doctrine, under the Constitution of the Japanese Empire, i.e., the so-called Meiji Constitution, the Government had no duty to pay compensation for any damage caused by the Government through the exercise of its power.

In the present case, the decision depended on the interpretation of the San Francisco Peace Treaty, and not on the doctrine of the non-accountability of the State. And this seems to point to the future judicial trend, which is again supported by a recent lawsuit that dealt with similar issues involving the individuals' claims for war damage (Kyoto District Court, January 15, 2003).

Nevertheless, since the cases which involve the problems relating to non-accountability of the State are of various backgrounds, and this doctrine was adopted again in another recent lawsuit (Osaka High Court, May 30, 2003), it may still be premature to discuss the relevant precedents in a uniform manner. What may be observed at least, however, is that this doctrine has begun to receive some challenges today.

In any case, it seems clear that the interpretation of Art. 14 (b) of the San Francisco Peace Treaty will become one of the most controversial and even more complicated issues in the future. As the plaintiff argued, there are no words which explictly mean individual's private claim in Art. 14 (b). So, it is difficult to decide what "reparations claims of the Allied Powers" means clearly. Concering this point, the Court reached the above-mentioned conclusions on the basis of "the context" without specifying what that means. The problem thus remains as to exactly what the "context" means. Further, it is not clear whether such an interpretation is valid against the "object and purpose" test under Art. 31 of the Vienna Convention of Law of Treaties. Unless the meaning of this word

is further clarified, a most crucial point in the decision remain problematic: Why did the Court adopt the reasoning that the substantial claims of individuals' had disappeared, and why didn't it adopt the Japanese Government's position that under the Peace Treaty, no claims of individuals may be satisfied, though claims themselves have not been eliminated?

As this is the first time that the Japanese Court held, regarding the San Francisco Peace Treaty, that all issues of mutual claims between the Allied Powers and their nationals on the one hand and Japan on the other are considered to have been finally settled. The decision of this case is especially important among many cases about claims for war damage. Moreover, for these reasons, this will have certain effect as a judicial precedent for other similar cases. Regarding these reasons, it is necessary that further precedents be accumulated before clearer conclusions may be drawn on these issues.