

Article 3 of the Hague Convention on Land Warfare (1907) — Rights of Individuals to Make Claims for Compensatory Damages — Rights of Individuals in General under International Law — Direct Applicability of Treaties — Articles 31 and 32 of the Vienna Convention on the Law of Treaties — Methods of Treaty Interpretation — Preparatory Work — Subsequent Practices — International Customary Law

Tokyo District Court, Judgment, November 30, 1998; H.T. (991) 262 [1999]

X et al. v. State of Japan

The plaintiffs, X et al. are Dutch nationals who were interned in prisoner-of-war camps or private detainee camps under occupation by the Japanese military forces during World War II. The plaintiffs filed a claim against the State of Japan for compensatory damages of US \$22,000 per person, based on Article 3 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land [hereinafter the Hague Convention] and a rule of international customary law of the same content. According to the plaintiffs, they were either subjected to severe forced labor and cruel treatment, or made to serve as a comfort woman to

provide sexual services to the occupying forces, as a result of which they all suffered damages. They alleged that all those acts were conducted by the Japanese military in violation both of the Regulations Respecting the Laws and Customs of War on Land (hereinafter the Hague Regulations) annexed to the Hague Convention and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, or of the former.

The Tokyo District Court in its judgment of July 27, 1995¹¹ has already entertained a similar claim by foreign nationals against the State of Japan for compensation for wartime damages suffered, for example, from cruel treatment as prisoners of war. In that judgment, whether Article 3 of the Hague Convention afforded the proper basis for a claim was one of the issues and was answered in the negative. The present judgment took up this issue again for a full-scale deliberation and rendered a substantive decision in this regard.

Held: '1. All of the plaintiffs' claims shall be dismissed.

2. The cost of litigation shall be borne by the plaintiffs.'

Upon the grounds stated below:

I. Issue in the Present Case

According to all the evidence and arguments, each fact of the damages sustained by each plaintiff as alleged can be properly established.

Therefore, whether the claims of the plaintiffs can be granted in this case depends on whether individuals who suffered damages from those acts of a member of the Japanese military in contravention of international humanitarian law can bring a claim for compensatory damages against the State to whose armed forces the individual belongs, based on Article 3 of the Hague Convention and rules of international customary law of the same content. This is the issue in the present case. Therefore this point will be considered below.

II. Decision on the Issue

1. The Hague Convention was signed in The Hague, the Netherlands, on October 18, 1907 and the respondent State ratified it on November 6, 1911 and then promulgated it on January 13, 1912. Article 3 of the Convention provides: "A belligerent party which violates the provisions of the said Regulations [the Hague Regulations] shall, if the case demands, be liable to pay compensation. It shall be

(1) 39 JAIL 265 (1996).

responsible for all acts committed by persons forming part of its armed forces."

According to the terms of this provision, it is clear that the State whose armed forces violated the rules of war as were provided in the Hague Regulations bears the duty of compensation for damages caused by those unlawful acts. This article, however, does not spell out clearly whose damage is to become subject to the compensation or to whom and how the compensation should be paid.

2. (1) International law, by nature, is a system of law which governs the State-to-State relations and rules of international law, in principle, stipulate the rights and duties of a State.

As a principle of international law, a State bears an international responsibility for its conduct in breach of its international obligations toward another State whose legal interest was thereby injured. Generally, even when an individual directly suffered damage from an act of a State in violation of its international obligations, such damage is construed as damage suffered by the State to which the individual belongs. Therefore, individuals can seek redress only indirectly through the exercise of diplomatic protection by their own government.

Though it is true that international law does not primarily stipulate individual rights and duties, nevertheless, in very exceptional cases today there are treaties that expressly grant certain rights to individuals, as in some human rights treaties. In this light it cannot be lightly concluded by the simple fact that it is international law that no such things as individual rights or individual rights to bring claims should be involved.

As to those exceptional treaties, however, they usually provide at the same time special procedures and systems under international law to enable individuals to obtain their rights.

(2) In Japan, as a general rule, international treaties bear domestic legal force by way of promulgation (see Articles 7(1) and 98(2) of the Constitution of Japan). In order for a treaty to have a direct applicability in domestic courts so that it can directly regulate individual rights and duties without any special measures to complement it or concretize it through national legislation, there are certain conditions. This is so in light of the basic nature of international law as defined above. First, the content of individual rights and duties must be clearly defined in the treaty. Furthermore, in accordance with the terms and object of the treaty, it must be ascertained that States party to it in fact intended to establish such individual rights and duties. In particular, in order for it to rightly afford the basis of an individual right of claim against a State in domestic courts, the treaty must provide with utmost clarity the content of such an individual right to bring a claim. This is so dictated in view of the separation of the judicial and legislative powers and the stability of the legal order.

3. Upon the above considerations, the meaning of Article 3 of the Hague Convention will be discussed now.

(1) Treaty interpretation, in general, must be effectuated in accordance with rules of interpretation that existed at the time of its entry into force. As to the methods of interpretation around 1910, when the Hague Convention entered into force, no express provisions in this regard existed.

However, it is understood that rules of treaty interpretation that then existed were, through judgments of the International Court of Justice and other practices, later refined and incorporated in the 1969 Vienna Convention on the Law of Treaties [hereinafter the 1969 Vienna Convention]. In this sense rules of treaty interpretation around 1910 and rules enshrined in the 1969 Vienna Convention resemble each other in their object and substance. Therefore, Article 3 of the Hague Convention shall be interpreted in accordance with the methods of interpretation as are stipulated in the 1969 Vienna Convention.

Referring to each provision of the 1969 Vienna Convention, we see that Article 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and Article 32 refers to the preparatory work and the circumstances of its conclusion as supplementary means, of which the purpose is "to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

Accordingly it must be said that in general the basic purpose of treaty interpretation is, above all, to ascertain the objective meaning of the terms of the treaty. This being so, Article 3 of the Hague Convention only stipulates that an offending State shall bear an international responsibility to pay compensation. There is no provision on such issues as how this compensation shall be effectuated and whether individuals hold the right to claim compensation. No mention is made about individuals. In the light of the Hague Convention as a whole, there is no provision that might suggest that an individual can be the subject of a claim for compensation and that an individual can exercise such a right.

(2) (i) Though it is only as a supplementary means, there is room to take the preparatory work of the treaty into account in its interpretation. Therefore, the drafting process of Article 3 of the Hague Convention is to be considered as supplementary.

(ii) The following facts are acknowledged according to all the evidence and arguments submitted.

(a) Article 3 of the Hague Convention was discussed and adopted at the Second Hague Peace Conference in 1907.

(b) In the First Subcommittee of the Second Commission of the 1907 Second Hague Peace Conference, which was working on amendment of the 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land [hereinafter the 1899 Convention] and the 1899 Regulations annexed thereto, the delegation from Germany made the following proposal. The proposal aimed to complement the 1899 Regulations by way of adding a sanction provision regarding indemnification for violation of the Regulations:

Article 1

A belligerent party which shall violate the provisions of these Regulations to the prejudice of neutral persons shall be liable to indemnify those persons for the wrong done them. It shall be responsible for all acts committed by persons forming part of its armed forces. The estimation of the damage caused and the indemnity to be paid, unless immediately indemnification in cash has been provided, may be postponed, if the belligerent party considers that such estimate is incompatible, for the time being, with military operations.

Article 2

In case of violation to the prejudice of the hostile party, the question of indemnity will be settled at the conclusion of peace.

(c) An explanation was given for the above proposal by the German delegation leader Major General von Gündell, which was largely as follows:

"According to the [1899] Convention respecting the laws and customs of war on land the Governments are under no other obligation than to give to their armed forces instructions in accordance with the provisions contained in the Regulations annexed thereto. Granting that these provisions must form a part of the military instructions, their infraction would come under the head of the penal laws which safeguard the discipline of the armies. However, we cannot pretend that this sanction is sufficient to prevent absolutely all individual transgression...."

Under these circumstances it is proper to anticipate the consequences of infractions which might be committed against the requirements of the Regulations. According to a principle of private law, he who by an unlawful act, through intent or negligence, infringes the right of another, must make reparation to this other for the damage done. This principle is equally applicable in the domain of international law and especially in the cases in point. However, we cannot hold here to the theory of the subjective fault by which the State would be responsible only if a lack of care or surveillance were established against it. The case most frequently occurring will be that in which no negligence is chargeable to the Government itself. If in this case persons injured as a consequence of violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at

fault, they would fail in the majority of cases to obtain the indemnification due them. We think therefore that the responsibility for every unlawful act committed in violation of the Regulations by persons forming part of the armed force should rest with the Governments to which they belong.

In regard to the manner in which the responsibility, the importance of the damage, as well as the method of paying the indemnity shall be decided, a distinction must be made as to whether the violation has been committed to the prejudice of a neutral or of a *ressortissant* of the enemy State. In the first case the necessary measures should be taken to assure a reparation as is compatible with military operations. If, on the contrary, it has to do with a violation to the prejudice of an enemy subject, it appears indispensable to defer the settlement of the question of indemnity until the conclusion of peace."

(d) To this German proposition, discussion centered on the distinction between neutral persons and persons of the enemy State. It was criticized that the proposition did not recognize any right of persons of the enemy State, despite their legitimate rights being injured in a like manner for which reparation should be like those under the Regulations, irrespective of whether they are neutrals or enemy persons. To this the German delegation leader replied that he did not intend to create a privileged position in favor of neutrals and the proposition made a difference only as regards the method of paying indemnities.

(e) Upon deliberation on the subject, the Second Commission revised the wording of the German proposition as follows: "A belligerent party which shall violate the provisions of the present 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." This provision was adopted unanimously by the Conference and in the end it was incorporated as Article 3 within the text of the Convention, not within the Regulations annexed thereto.

(iii) Upon these facts it is acknowledged that, in the drafting process of Article 3 of the 1907 Hague Convention, the issue of reparation for individuals who suffered damages was also within the purview of this article. However, there is no evidence in the same process that might suggest an intention of States party to it to stipulate the article in a way that enables individuals to bring direct claims for compensation against the State. Nor were there any statements by delegations of the States party to it suggesting that there existed an agreement among them as to the creation of a provision that would stipulate individual right of claims. Rather, the following declaration made by the Swiss delegation during the deliberation process of Article 3 will be recalled:

"The settlement of indemnities due to neutrals can most of the time take place without delay for the simple reason that the responsible belligerent State is at peace with their country and continues with the latter

peaceful relations which will permit the two States to discharge easily and without delay all cases presented. The same facility or possibility does not exist between the belligerents by the very fact of the war, and although the right to an indemnity arises in favor of their respective *ressortissants*, as well as in favor of neutrals, the settlement of the indemnities between belligerents can scarcely be arranged and made effective until the conclusion of peace."

The German delegation leader Major General von Gündell expressed his gratitude for this remark by the Swiss delegation, saying that he himself could not have better defended his proposition. In this light, it is supposed that each State at the time of the Conference took it for granted that reparation for injured individuals could be effectuated only through traditional diplomatic protection in accordance with the principle of international law.

In addition to these circumstances, recalling that reference to the preparatory work is only supplementary to treaty interpretation, it is observed that the drafting process of Article 3 of the Hague Convention hardly affects the textual interpretation of this article.

(3) (i) In the process of treaty interpretation, as Article 31 (3) of the 1969 Vienna Convention stipulates that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account together with the context, it is generally possible to take into account conduct of States party to it. According to the evidence submitted, it is acknowledged that there have been few cases to date in which injured individuals' claims against offending States were granted in domestic courts.

(ii) The plaintiffs allege that, citing a judgment of April 9, 1954 by Münster Administrative Court of Appeals in the Federal Republic of Germany, it was a case in which an individual claim for compensation against the State was granted based on Article 3 of the Hague Convention. In this case, a German national who was badly injured by an automobile in use by the British Occupation Army in a territory occupied by British military forces, claimed compensation from the German Government. However, this was not a claim for compensation against the Government of Great Britain. Therefore, this judgment cannot serve as a precedent in which a direct claim for compensation by an injured individual himself against the offending State was granted on the basis of Article 3 of the Hague Convention.

(iii) The plaintiffs also allege that in various peace treaties, as in the case of the Treaty of Versailles concluded after the World War I, it was expressly provided that the duty of an offending State is to make compensation to injured individuals.

True international systems may be created in which injured individuals directly receive indemnities from an offending State, even though in the normal course it is the injured State which claims for compensation against the offending State. This

will be effectuated through establishment of, for example, a mixed arbitral tribunal, as in the case of the Treaty of Versailles.

However, the individual right to file claims with the mixed arbitral tribunal in this case is admitted simply because the parties involved so agreed. Therefore, the cases of peace treaties alleged by the plaintiffs cannot be regarded as a practice that would support the individual right of claims for compensation based on Article 3 of the Hague Convention.

In this connection, there is at present no international agreement to the effect that, based on Article 3 of the Hague Convention, injured individuals may bring a direct claim for compensation in domestic courts of the offending State for its responsibility.

(4) Taking into account all that has been determined and stated so far, Article 3 of the Hague Convention only stipulates international responsibility of a State for its violations of the Regulations annexed thereto toward the injured State. It must be stated that in the courts of Japan, individuals who suffered damages by those acts of armed forces members in violation of international humanitarian law cannot claim for compensation against the State to which the offenders belonged.

True, according to the evidence, today it is to be admitted that views exist which recognize the possibility of individual claims. Those are all personal views, however, and cannot be upheld by the present Court.

(5) According to the plaintiffs, by the time of World War II during which those alleged offending acts were committed, the rule provided in Article 3 of the Hague Convention had been established as a rule of international customary law that obligated an offending State to pay compensation to individuals who suffered damages due to its conduct violating not only the Hague Regulations, but also international humanitarian law in general. The plaintiffs allege that they obtained their right to claim for compensation against the respondent through this rule of international customary law. However, since Article 3 of the Hague Convention cannot be a ground to support the claim, it is clear that a rule of international law of the same content, even if it existed, cannot serve as the basis for the claim. Moreover, even if the allegation by the plaintiffs pointed to the existence of international customary law recognizing direct individual claims for compensation against the offending State irrespective of Article 3 of the Hague Convention, there exist no such rules of international customary law to date.

III. As discussed above, all the allegations made by the plaintiffs have no grounds and therefore shall be dismissed. The cost of litigation will be borne by the plaintiffs as enunciated in the holding by applying Articles 61 and 65 of the Code of Civil Procedure.

Judge Taichi Kajimura (presiding)
 Judge Tamami Masumori
 Judge Hisashi Oyori