

Urteil des Obergerichtes Tōkyō vom 5. März 1993, mit welchem die Klage gegen den japanischen Staat, auf Entschädigung japanischer Kriegsgefangener in der Sowjetunion, abgewiesen wurde.

Das Oberste Gericht Japans hat die Abweisung bestätigt.

X et al. v. STATE OF JAPAN

Tokyo High Court, 5 March 1993

Hanrei Jiho [Judicial Reports] No. 1446, 1993, p. 40

"Compensation for Japanese prisoners of war detained in the USSR after World War II; Non-retroactivity of Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949; The non-customary character of the rule of "Compensation by the Power on which the prisoner depends" Municipal applicability of international law; **No Legal Obligation for the State of Japan to settle credit balances due to the repatriated prisoners of war**

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At the closing stage of World War II, the Soviet Union declared war against Japan on 8 August 1945 and invaded and occupied Manchuria, Kwantung Province, the northern part of Korea, South Sakhalin and the Kuril Islands. As a result, about 700,000 officers and men of the Japanese Army surrendered to the Soviet Army. They were detained as prisoners of war and transferred to some two thousand Soviet camps in, inter alia, Siberia, Central Asia, European Russia, the Far North and Outer Mongolia.

These Japanese POWs were compelled to forced labour, mostly outdoors, such as building of concentration camps, deforestation for railways, construction of houses, factories, bridges, dams, power plants and canals, coal mining, cargo handling in harbours, farm work, etc. About 60,000 POWs died of starvation because of the bad food situation, heavy labour conditions, infectious diseases, or severe weather conditions. Among those who survived and were repatriated (not until 1958 was their repatriation practically completed) many suffered from mental and physical injuries and disabilities.

In April 1981, sixty-one ex-POWs and a widow of one of the ex-POWs brought a case before the Tokyo District Court. They sued the State of Japan for settlement of the credit balances resulting from the forced labour during the detention in the USSR, and for compen-

sation for the injuries and disabilities caused by the forced labour as well as for all other damage suffered during the detention and imputable to the Detaining Power.

The Tokyo District Court in its judgment of 18 April 1989(note 0) dismissed all claims of the plaintiffs. The judgment was based on, inter alia, two considerations of international law:

First, the claims were filed under Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter: Third Geneva Convention) (note 3) and were directed against the State of Japan as "the Power on which the prisoner of war depends". **The Court held the Convention to be inapplicable because most of the plaintiffs had lost their POW-status by repatriation before the Convention had entered into force between Japan and the USSR (note 4) and because the provisions of the Convention could not be applied retroactively to the results of World War II.**

Secondly, the claims were based, inter alia, on the so-called "Rule of compensation by the state on which the POW depends". This rule, which is contained in Articles 66 and 68 of the Convention, was allegedly already established as a rule of international customary law at a time not later than the termination of hostilities of World War II. **However, the Court denied the rule to be so established in the absence of evidence of general practice and opinio juris among the belligerents in World War II, these being the requisites for the existence of international customary law.**

The Court also examined, and dismissed, the claims under Article 29, paragraph 3 of the Constitution of Japan (which contains the principle of just compensation in case of taking of private property for public purposes), Article 1 of the State Tort Liability Act and the tort law of the Civil Code. **The plaintiffs had alleged that under these provisions the State of Japan was liable for damage caused by its unlawful exercise of public authority, such as its waiver of the plaintiffs' rights to claim from the USSR, under paragraph 6 of the Japan-USSR Joint Declaration of 1956.**

The Tokyo High Court found, basically on the same grounds as the Court below, that all the original claims of the appellants as well as a new claim submitted before the High Court were groundless, and, consequently, dismissed the appeal. The grounds for the judgment, so far as relevant to international law, were as follows: (note 1)

(1) On the applicability of Articles 66 and 68 of the Third Geneva Convention

Unlike the appellants' contention the Convention was not included for the purpose of (post-war) management of matters stemming from the past war but was adopted by states which recognized the defects and inadequacies of the existing law relating to prisoners of war and which strived for its improvement. Besides there is insufficient evidence in the drafting history of the Convention for the view that the Convention was intended to apply retroactively to the facts of World War II. Neither can this applicability be achieved by appellants' reference to Article 141 (note 5) of the Convention.

It was contended by the appellants that the termination of the status of POW by release or repatriation does not imply the lapse of either the person's rights resulting from his detention as a POW or the rights and obligations of the Powers concerned, i.e. the Detaining Power and the Power on which he depends, relating to his detention. The Court held:

"But the question as to what rights and obligations the POWs actually acquired during their detention which commenced before the Convention of 1949 entered into force between Japan and the USSR, how their acquired rights and obligations must be settled, or how their legal status is affected by their release or repatriation, shall, in principle, be determined solely according to the provisions of the treaties or other laws that were in force at the time of their detention and the termination of the status of POWS. Therefore, unless explicitly otherwise provided, the above questions cannot be settled by provisions of treaties or other laws that came into existence later.

— " One of the appellants was released from a Soviet prison and returned to Japan in November 1956, that is after the 1949 Geneva Convention had entered into force between Japan and the USSR. The appellants argued that, consequently, the Convention in any case applied to this one person. However, the Court held that, while it was established that the person concerned served as a prisoner convicted of espionage (note 6) under Article 58 of the Russian Penal Code, at least from 1950 until his return home in 1956,

"the Convention is, by its nature, applicable only to those who have the status of POW and only in respect of their detention as POWs. Consequently, with a view to securing an unequivocal administration of the provisions of the Convention there is no reason, unless explicitly otherwise provided, to apply the Convention retroactively to a person who had, at one time, been excluded from the application of the Convention because of his conviction for war crimes or other crimes mentioned in the [Soviet] reservation to Article 85 of the

Convention, despite the fact that [according to the appellants] the conviction was later reviewed and quashed [in the USSR in 1991]."

(2) On the question of whether Articles 66 and 68 of the Third Geneva Convention are in fact codified rules of customary international law

As to the so-called "Rule of compensation by the State on which the POW depends", the Court held, taking the drafting process into account: "It is difficult to establish, as the appellants allege, that the rule of compensation by the state on which the POW depends had already become a general practice among those states which participated in the conference of experts, the diplomatic conference and other conferences (note 7) or, had already been effected by these states with *opinio juris sive necessitatis* when the conferences were convened.

"The Court described the outcome of the development of international law relating to the protection of POWs, especially since the 19th century and under the impact of the idea of human rights, as follows:

"Of course the concrete contents of proper treatment, rights and interests to which POWs are entitled have been gradually expanded and reinforced in keeping with historical developments, and it is generally recognized today that at least certain principles bearing on the fundamental human rights of POWs have become rules of international customary law which detaining Powers are obliged to observe, such as, for example, the principles that POWs are not in the power of the individuals or military units who have captured them, but of the enemy Power; that reprisals against POWs are prohibited; that during the detention POWs must be protected and respected as human beings; that detaining Powers must provide POWs with clothings, food, etc.; that no POWs may be employed for labour of an improper nature, such as unhealthy and dangerous labour; and that the hygiene at POW camps is to be ensured. **However, in view of a general survey of the municipal law systems of major countries including Japan on the matter of compensation to POWs of their own nationality, it can hardly be acknowledged that the alleged rule of compensation by the state on which the POW depends satisfied the requirements of general practice and *opinio juris* and had been established as a rule of international customary law at the time when the appellants were detained in Siberia.**"

(3) On the question of the domestic applicability of the relevant rules of international law

"The domestic applicability of the relevant rules of international law, that is to say, the question of whether such rules are directly applicable to the appellants without any national legislation, must be examined. It is well-accepted in Japan that duly promulgated treaties and international customary law are recognized to have domestic effect without any special legislative acts. But when the content of a rule established by a treaty is not clear and precise, or when a rule of international customary law which deals with rights and interests of individual nationals does not specify in detail the substantive conditions for the coming into existence, duration, extinction, etc. of these rights, the procedural conditions for their exercise, and their coordination with the existing municipal law, we cannot but deny the domestic applicability of the rule in question.

Therefore, even if it could be acknowledged that Articles 66 en 68 of the Third Geneva Convention of 1949 were applicable to the appellants, or that international customary law to the same effect had been established, yet the appellants may not be admitted to claim for compensation directly on the basis of these Articles or the international customary law to the same effect, as these Articles are not clear nor precise in respect of the scope of entitled persons, nor in respect of the content, method, duration, etc. of the compensation, and, moreover, do not define the interconnection with the domestic systems of pensions, allowances, accident compensation, and so on, which were introduced in many countries since before World War II on behalf of soldiers of their own nationality." (4) On the new claim of the alleged equality of the delay in the payment of credit balances

According to the appellants, several memoranda of the General Headquarters of the Supreme Commander of the Allied Powers (GHQ-SCAP) of 8 February, 16 March and 7 May 1946, which the Japanese government was obliged to implement, permitted the Japanese government, as part of the occupation policy and by way of exception to the general prohibitions, to pay the total amounts of earnings of repatriated Japanese POWs during their detention. Referring to these memoranda and the practice of the Japanese government in liquidating credit balances on the basis of these memoranda, the appellants contended that the appellee was under an obligation to settle the credit balances even with those repatriated POWs who possessed no sufficient documents to prove these balances. With regard to this contention the Court found as follows:

"For several years after the War, the Allied Powers restricted the import of currency and other valuables into Japan ... for the purpose of reconstruction of the Japanese economy

which was in disorder because of the long War. However, the liquidation of the credit balances of ex-POWs was permitted under certain restrictions, i.c. on condition that they possessed certificates of their earnings as POWs. Japan, which was under occupation and in a position of faithfully implementing the occupation policy of the Allied Powers, took the necessary measures and made the payments instead of the detaining Powers, provided that the relevant documents were presented. Therefore, it is difficult to acknowledge the appellants' contention to the effect that Japan settled the credit balances due to Japanese POWs during their detention by way of fulfilling an obligation under international law.

[I]t is evident that the Soviet authorities neither issued nor presented any documents to prove the earnings of the POWs detained in Siberia, despite the request of the Japanese government to the GHQ-SCAP **[There is no sufficient proof that Japan has recognized a legal responsibility** for settling the credit balances of the Japanese POWs in World War II, or has enacted a law accepting such responsibility. Therefore, at all events, the claim of the appellants which is premised on the assumption that the appellee was under a legal obligation to settle credit balances with the ex-POWs detained in Siberia, including the appellants, cannot be admitted.

The appellants appealed to the Supreme Court.

note 1 Cf. English translation in 37 JAIL (1994) 129.

note 2 Hanrei Jiho No. 1329, 1990, p.36.

note 3 The relevant provisions read as follows, in part:

Art. 58: "... [T]he Detaining Power may determine the maximum amount of money that prisoners may have in their possession. Any amount in excess shall be placed to their account..."

Art. 64: "The Detaining Power shall hold an account for each prisoner of war, showing at least the following. (1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source;... (2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request;..."

Art. 66: "On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement... showing the credit balance then due to him. The Detaining Power shall also send... to the Government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated ... and showing

the amount of their credit balances.Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict. The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity".

Art. 68: "Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability,....

.....Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power ... shall likewise be referred to the Power on which he depends ... The Detaining Power will, in all cases, provide the prisoner of war with a statement ... showing all available information A copy of this statement will be forwarded to the Power on which he depends...."

note 4 Japan acceded to the Convention on 21 April 1953 and the USSR ratified it on 10 May 1954 (the judgment erroneously mentions 10 November 1954, the date of entry into force of the Convention, as the date of "accession by the USSR"). Two of the 62 plaintiffs returned home in 1956, after the entry into force of the Convention between the two states. One of these two had been handed over as a suspected war criminal to the People's Republic of China in 1950 and was imprisoned there until repatriation and the other had been convicted of espionage in the USSR in 1949 and had served in Soviet prison before being returned home. The Court held that the Convention was not applicable to this person because of the Soviet reservation to Art. 85 of the Convention ("Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention").

note 5 "The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation...."

note 6 See supra, note. 2.

note 7 Respectively, the Preliminary Conference in 1946, the Conference of Government Experts in 1947, the 17th International Red Cross Conference in 1948, and the Diplomatic Conference in 1949.

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Richard Dähler, 2002. [Hervorhebungen von R.D.](#)

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