

7. International Law and Organizations

X 1-198 v. the State

Tokyo District Court, February 25, 2015

Case Nos. 6484 (2006), 18382 (2008), 35183 (2008) and 35262 (2009)

Summary:

The Tokyo District Court dismissed the claim of compensation and apology for the Chongqing bombing during the Second World War allegedly violating the Hague Convention and customary international law. In line with the precedents as regards war reparations, the judgment deals with some controversial issues, particularly, the subjectivity of individuals in international law, and procedural and substantive rights to remedy.

Reference:

Article 3 of the 1907 IV Hague Convention; the 1923 Hague Draft Rules of Air Warfare; the prohibition of the indiscriminate bombing of undefended cities; and the principle of military objective

Facts:

From 1938 to 1943 during the Second World War, the Japanese Army bombed Chongqing city, the new capital of the Republic of China at the time, and its surrounding areas, and thereby killed and injured a great number of citizens. The 198 applicants, who are the victims and their families of the bombing, claimed compensation and apology by Japan, alleging that the act violated Article 3 of the 1907 IV Hague Convention and the rules of customary international law identical to the Convention and the 1923 Hague Draft Rules of Air Warfare. From the perspective of domestic law, the applicants also alleged the violations of Japanese and Chinese tort law and reason (*jōri*), and the legislative and administrative omissions of providing redress for the victims. Although not rebuffing the fact of bombing alleged by the applicants, the Respondent argued that the Applicants have no legal grounds, whether domestic or international, for

their claims, and that, at any rate, their claims have been waived by the 1951 San Francisco Peace Treaty and the 1972 Japan-China Joint Communiqué.

Opinion:

The claim is dismissed.

1. The Subjectivity of Individuals in International Law

Since international law primarily governs the relationship between sovereign States, the wartime injury to individuals caused by States other than the State to which they belong shall be in principle settled between these States through the exercise of diplomatic protection by the home State. Consequently, individual victims are not entitled to directly invoke the right to remedy against injuring States unless there exist special international legal norms permitting the entitlement.

2. The Claim Based on the Hague Convention

Although Article 3 of the Hague Convention imposes the obligation of compensation on belligerent parties violating its provisions, there is no reference to those who are entitled to the compensation nor special prescription on the international legal subjectivity regarding the entitlement. The Hague Convention aims at the relief of victims by achieving its purpose between mutual belligerent parties, and therefore its nature as the law of warfare does not immediately yield the alleged subjectivity of individuals in international law. Nor is there any evidence in the travaux préparatoires of the Hague Convention which would indicate the shared understanding of providing individuals with the right to claim compensation. Likewise, the judicial decisions of foreign countries do not acknowledge the entitlement of individuals to make a direct claim against injuring States on the grounds of the Hague Convention.

3. The Claim Based on Customary International Law

As premises for the interpretation of the Hague Convention examined above, it cannot be recognized that a customary rule was established, which accorded individuals the right to take direct action against injuring States. Admittedly, given that the Draft Rules of Air Warfare were

evaluated as authoritative among international legal scholars, and their basic rules conformed with international rules and practices at that time, it is recognized that the prohibition of the indiscriminate bombing of undefended cities and the principle of military objective prescribed in the Draft Rules had been crystalized as customary international law when the bombing took place. Nevertheless, the Draft Rules do not clearly stipulate that individual victims are entitled to the right to compensation while imposing the obligation of compensation on a State having violated the Rules by attacking non-military objectives.

In conclusion, the applicants can invoke neither the Hague Convention nor customary international law to claim compensation and apology against the respondent.

Editorial Note:

As a positive development, the Tokyo District Court confirmed that the prohibition of the indiscriminate bombing of undefended cities and the principle of military objective had become customary law when the bombing in question took place. Although this finding follows the reasoning adopted in the precedent *Simoda* (the Tokyo District Court, December 7, 1963), it should be emphasized that, while the latter case concerned the atomic bombings in Hiroshima and Nagasaki in 1945, the former addressed the indiscriminate and constant air campaigns by conventional bombs from 1938 to 1943.

However, the present judgment has several problems in terms of the redress for victims. Firstly, the Tokyo District Court, in line with the *Simoda* ruling, approved the international procedure doctrine, according to which an individual is to be considered as a subject of international law only when the international procedures to realize his/her substantive rights are provided for by a treaty or a rule of customary law. Many scholars in Japan, however, advocate the procedure doctrine that includes not only international but also domestic procedures as the yardstick for assessing the international legal subjectivity of individuals. Since Article 98 (2) of the Japanese Constitution indicates that a treaty concluded by Japan is a part of domestic law, and Article 1 of the State Redress Act (Act No. 125 of October 27, 1947) provides that, when a public officer unlawfully inflicted damage on another person, the State shall assume the

responsibility to compensate therefore, it is conceivable that an individual victim is granted the procedural right to claim compensation under the Act for the violation of the Hague Convention as a part of the domestic law of Japan. Nevertheless, the Court did not examine this doctrine at all, and eventually closed the gate to the effective redress for victims.

Secondly, the Court paid no attention to the recent developments concerning the individual right to reparation and then, by relying on the traditional structure of international law, reaffirmed easily that the Hague Convention does not grant individuals the right to claim compensation. Although it is undeniable that the latter view is still dominant, it should not be overlooked that an opposite view is emerging in light of the human-centric development of contemporary international law. Remarkably, in the drafting process of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the representative of the International Committee of the Red Cross manifestly stated that “article 3 of the Hague Convention of 18 October 1907 (currently part of customary law) required States to compensate individuals for violations” (UN Doc.E/CN.4/2003/63, para. 50). The Court should have taken into account the new trend in interpreting the Hague Convention.

Thirdly, in spite of ascertaining the customary rules embodied in the Draft Rules of Air Warfare, the Tokyo District Court did not apply them to the Chongqing bombing to determine its (un)lawfulness. As provided in Article 37(2) of the Articles on Responsibility of States for Internationally Wrongful Acts and Paragraph 22 of the before-mentioned Basic Principles and Guidelines, ‘satisfaction’ as a form of reparation includes a formal and public apology typified by a declaration of the wrongfulness of acts by a competent court or tribunal. Such a measure represents not only the past-oriented aspect of remedying victims but also the future-oriented aspect of restoring the affected legal relationship for non-repetition. Given that the subjective injury is not required in the latter aspect, state responsibility for the Chongqing bombing may be declared for the maintenance of the international legal order, regardless of the controversial issue of the international legal subjectivity of individuals.

Notwithstanding the Respondent’s argument, the waiver of

individuals' claims on the basis of the 1951 San Francisco Peace Treaty was not raised as an issue. The present judgment therefore did not consider the effect and scope of the so-called "San Francisco Peace Treaty Framework" doctrine and its application to the 1972 Japan-China Joint Communiqué, both of which were issued by the Supreme Court in the 2007 Nishimatsu ruling.