

## Kamibayashi v. Japan: Denying POWs Compensation

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## NOTE

### **KAMIBAYASHI v. JAPAN: DENYING POWs COMPENSATION**

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#### I. INTRODUCTION

In *Kamibayashi v. Japan*,<sup>1</sup> the Tokyo District Court held, with

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1. 29 I.L.M. 391 (1990). *International Legal Materials* provides the English translation of the Tokyo District Court's "Summary of Reasons" and excerpts of the Court's decision relating to claims based in international law. An analysis of the Court's decision with regard to claims based in domestic law is beyond the scope of this

regard to international law, that: (1) the 1949 Geneva Convention Relative to the Treatment of Prisoners of War<sup>2</sup> (1949 Third Geneva Convention) is not retroactive, and (2) the Power of Origin is not compelled under customary international law to compensate its own nationals that were held captive as prisoners of war (POWs) during World War II. Judge Tetsunobu Kinoshita, delivering the judgment of the Court,<sup>3</sup> stated that absent an intent of the contracting parties or an explicit provision to the contrary, the 1949 Third Geneva Convention is not applicable to POWs who had been repatriated prior to the effective date of the Convention.<sup>4</sup> More controversially, however, the Court found that neither Article 66 of the 1949 Third Geneva Convention, requiring the Power of Origin to settle the credit balances of POWs upon termination of their captivity, nor Article 68, referring to the Power of Origin any POW claims for compensation of work-related injury or disability after repatriation, was a codification of prevailing customary international law.<sup>5</sup>

This note discusses *Kamibayashi*'s impact on actions for compensation brought by POWs against the Power of Origin. By lumping together the POWs' claim for wages with their claim for compensation of injury, *Kamibayashi* denied injured POWs, as a subset of all wage-seeking POWs, a separate and necessary cause of action based on cus-

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case note. *Contra Judicial Decisions in Japan*, 32 JAPANESE ANN. INT'L L. 125 (1989) (providing an English translation of excerpts from the Court's decision, including those related to domestic claims) [hereinafter *Judicial Decisions*].

2. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter 1949 Third Geneva Convention].

3. Judge Takao Inamari originally drafted the Court's reasons, but he was transferred to another post before the closing session of the Court. See *Kamibayashi*, 29 I.L.M. at 393 (introductory note).

4. *Id.* at 396. The Court uses "effective date" as an ambiguous term. It is referred to as the date on which the 1949 Third Geneva Convention "goes into force" for a particular State, pursuant to Article 140. See, e.g., *Judicial Decisions*, *supra* note 1, at 128. In addition "effective date" is also used to denote the date on which the Convention becomes applicable between two States, pursuant to Article 2. See, e.g., *Kamibayashi*, 29 I.L.M. at 403. The "effective date", here, refers to the date on which the Convention took effect between the POW's Home Country and the Detaining Power.

5. *Kamibayashi*, 29 I.L.M. at 434. Judge Kinoshita stated:

[I]t can not be maintained that a rule of customary international law which is the same as appeared in Articles 66 and 68 of the 1949 Convention has been established by the end of the Second World War or after the War and before formulation of the 1949 [Third Geneva] Convention when the Plaintiffs had been interned in [the] Soviet Union.

*Id.*

tomary international law.<sup>6</sup>

While injured POWs from the Persian Gulf War will not be affected by this decision, the *Kamabayashi* court sends a harsh message to injured POWs who are not able to avail themselves of favorable provisions of conventional law: customary international law does not require the Power of Origin to compensate its own POWs for unpaid wages or for injuries after repatriation.<sup>7</sup> Consequently, injured plaintiffs lose twice. This note concludes that, although the Court was correct in dismissing the POWs' claim against their own government for wages after World War II,<sup>8</sup> the Court should have held the Power of Origin liable for compensation of injuries persisting after the POWs' repatriation on the basis of customary international law.<sup>9</sup>

## II. STATEMENT OF THE CASE

On September 2, 1945, Japan officially proclaimed its unconditional surrender to China, Great Britain, the United States and the Soviet Union (Allied Powers).<sup>10</sup> Additionally, Japan accepted the terms of surrender that were set forth by the Allied Powers on July 26, 1945 in the Declaration of Potsdam.<sup>11</sup> One of the provisions of the Potsdam Proclamation provided for "[t]he Japanese military forces, after being completely disarmed, [to] be permitted to return to their homes with the opportunity to lead peaceful and productive lives."<sup>12</sup> All of the Allied Powers, except the Soviet Union, followed this provision and Japanese POWs were repatriated as soon as transportation to Japan became available.<sup>13</sup> As a result, almost all of the Japanese POWs were repatriated by 1947.<sup>14</sup>

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6. See *infra* notes 188-201 and accompanying text.

7. *Kamabayashi*, 29 I.L.M. at 436.

8. See *infra* text accompanying notes 135-40.

9. See *infra* notes 199-201 and accompanying text.

10. Instrument of Surrender of Japan, Tokyo, September 2, 1945, 59 Stat. 1733, E.A.S. 493, 3 Bevans 1251.

11. *Id.*

12. Declaration of Potsdam, July 26, 1945, 1945 For. Rel. 1474, 3 Bevans 1204, 1205.

13. H. Levie, Opinion of Professor Howard S. Levie With Respect to the Claim Against the Government of Japan Made by Former Members of the Japanese Military Forces Unlawfully Detained as Prisoners of War in Siberia, Central Asia, or Elsewhere, by the Soviet Union Long After the Termination of the Hostilities in World War II 26 (1983) (Professor Emeritus at St. Louis University School of Law) [hereinafter Opinion of Professor Levie]. Professor Levie prepared this opinion in order to advise the plaintiffs prior to the Tokyo District Court's decision.

14. *Kamabayashi*, 29 I.L.M. at 392.

Approximately 600,000 Japanese soldiers fell into the custody of the Soviet Union at the end of World War II.<sup>15</sup> Many of these captives were illegally detained for three to thirteen years after the termination of hostilities.<sup>16</sup> Those detained were transferred to POW and labor camps in Siberia, the Arctic Region, and the remote districts of the Ural Mountains.<sup>17</sup> In addition to the Soviet Union's violation of the Potsdam Declaration, the Soviet Union improperly treated the Japanese POWs. The POWs were not provided with adequate food, clothing, work safeguards, or medical supplies.<sup>18</sup> Consequently, many were killed or injured because of malnutrition, lack of rest, severe cold, and infectious diseases.<sup>19</sup> Moreover, they were subject to strenuous labor and unattainable production quotas, and they received little, if any, working pay.<sup>20</sup> By signing the Joint Declaration in 1956,<sup>21</sup> however, the Japanese Government made it impossible for Japan as a State, or its nationals as individuals, to make any claims against the Soviet Union.<sup>22</sup>

The Soviet Union did not complete repatriation of POWs until 1958.<sup>23</sup> Of the 600,000 Japanese POWs detained in the Soviet Union, about 500,000 returned home to Japan.<sup>24</sup> To date, approximately 200,000 are still alive but many suffer from social oppression, discrimination, and physical and mental handicaps.<sup>25</sup> On April 13, 1981,<sup>26</sup> sixty-two former POWs, who had been interned in the Soviet Union, filed suit against the Japanese Government to receive compensation for wages (payment of credit balances) and work-related injuries, as well as to receive compensation for other Soviet violations.<sup>27</sup> The plaintiffs sought total compensation of 264,100,000 yen.<sup>28</sup> Their claims were

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15. *Id.* at 391.

16. *Id.* at 392.

17. *Id.* at 391.

18. *Id.*

19. *Judicial Decisions, supra* note 1, at 126.

20. *Kamibayashi*, 29 I.L.M. at 392.

21. Joint Declaration of October 19, 1956, Japan-Soviet Union, 263 U.N.T.S. 99.

22. *See Id.* at art. 6, para. 2.

23. *Kamibayashi*, 29 I.L.M. at 392. However, all of the Japanese POW plaintiffs in this case, with the exception of two plaintiffs who are not considered in this note, had been repatriated prior to November 10, 1954. *Judicial Decisions, supra* note 1, at 128. *See infra* notes 49-51 and accompanying text (explaining the importance of this detail in relation to the issue of retroactivity of the 1949 Third Geneva Convention).

24. *Kamibayashi*, 29 I.L.M. at 392.

25. *Id.*

26. *Id.*

27. *See id.* at 400. This case note concentrates solely on the plaintiffs' claims for compensation of wages and compensation for injuries.

28. *Id.* at 392. Using the exchange rate for April 13, 1981, this is equivalent to

based in international law, specifically relating to the provisions of the 1949 Third Geneva Convention and customary international law, as well as in domestic law, relating to provisions of the Japanese Constitution and the Japanese National Compensation Law.<sup>29</sup>

Court proceedings continued for eight years and on April 18, 1989, the Tokyo District Court dismissed all of the plaintiffs' claims, both domestic and international.<sup>30</sup> The plaintiffs filed for an appeal on May 1, 1981,<sup>31</sup> and the Tokyo District Court's decision is currently pending appellate review.

### III. DETERMINING THE LAW APPLICABLE TO REPATRIATED POWS

#### A. Conventional Law

The *Kamibayashi* decision emphasizes an important issue of timing that courts must consider when applying conventional law: when the facts of a case occur prior to the effective date of an international agreement, are its relevant provisions retroactive?<sup>32</sup> If the court finds that the agreement's provisions are not retroactive, it must then determine the law that applies to the case.<sup>33</sup>

#### 1. Solving the Issue of Retroactivity

During and after World War II, most belligerents were governed by the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 Geneva Convention).<sup>34</sup> Although neither Japan nor the

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approximately 56,807,910,000 American dollars. Wall Street Journal, Apr. 13, 1981, at 36 (listing the exchange rate at 215.10 yen per U.S. dollar).

29. See *Kamibayashi*, 29 I.L.M. at 392.

30. *Id.* at 393.

31. *Id.*

32. See *id.* at 402-03 (recognizing the issue of retroactivity); see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 28, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 (addressing the issue of retroactivity) [hereinafter Vienna Convention].

33. It is only logical for a court, once it determines that particular provisions of a convention do not apply to a given case, to define the law that is available to decide the case at hand. See *Kamibayashi*, 29 I.L.M. at 407 (After ruling that Articles 66 and 68 of the 1949 Third Geneva Convention were not retroactive, the court proceeded to determine the law available).

34. See *Judicial Decisions*, *supra* note 1, at 127. See also Rundell, *Paying the POW in World War II*, 22 MILITARY AFFAIRS 121 (1958) (stating that it was provisions of the 1929 Geneva Convention that applied to the results of World War II) [hereinafter Rundell].

Soviet Union were parties to the Convention,<sup>35</sup> in 1942 Japan expressed her willingness to be bound by its provisions.<sup>36</sup> The POW payment provision in the 1929 Geneva Convention required, in effect, that the Detaining Power<sup>37</sup> satisfy credit balances of POWs upon their termination from captivity until (or unless) otherwise agreed upon by the belligerents.<sup>38</sup> It also required the Detaining Power to compensate POWs for work-related injuries after their repatriation.<sup>39</sup>

Shortly thereafter, the 1949 Third Geneva Convention required the Power of Origin to compensate POWs for accrued wages and work-related injuries persisting after repatriation.<sup>40</sup> Both Japan and the Soviet Union ratified the 1949 Third Geneva Convention.<sup>41</sup> The plaintiffs based their claim for compensation on the provisions of this most recent Convention.<sup>42</sup> As the Tokyo District Court ruled, however, there was a problem of timing that prevented the plaintiffs from prevailing on this claim.<sup>43</sup>

According to Article 140 of the 1949 Third Geneva Convention, accessions to the Convention take effect six months after they are received.<sup>44</sup> Japan acceded on April 21, 1953<sup>45</sup> and the Convention thus entered into force for Japan from October 21 of the same year.<sup>46</sup> The Soviet Union, however, did not accede to the 1949 Third Geneva Convention until November 10, 1954.<sup>47</sup> Therefore, the Convention did not become effective for the Soviet Union until May 10, 1955.<sup>48</sup> Although

35. H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 216 n.13 (1979) [hereinafter LEVIE].

36. *Id.* at 217.

37. The Detaining Power refers to the State holding the POW in captivity.

38. *See* Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 34, 47 Stat. 2021, T.S. No. 846; 118 L.N.T.S. 343 [hereinafter 1929 Geneva Convention].

39. *See id.* at art. 27. *See also* LEVIE, *supra* note 35, at 250 (stating that Article 27 of the 1929 Geneva Convention was redrafted because former Detaining Powers were not following its mandate after repatriation).

40. *See* 1949 Third Geneva Convention, *supra* note 2, arts. 66 & 68.

41. *See Kamibayashi*, 29 I.L.M. at 403: "[B]oth Japan and Soviet Union acceded to the Convention. Then, it is clear that the 1949 Convention is applicable to all cases of declared war or any other armed conflict between Japan and Soviet Union." *Id.*

42. *See id.* at 400.

43. *Id.* at 403.

44. 1949 Third Geneva Convention, *supra* note 2, art. 140.

45. *Kamibayashi*, 29 I.L.M. at 401.

46. *Id.*

47. *Id.*

48. *See supra* note 44 and accompanying text (giving the guidelines for calculating the effective date).

Japan's effective date was before that of the Soviet Union's, Japan did not become bound to the 1949 Geneva Convention's provisions vis-a-vis the Soviet Union until November 10, 1954, the date on which the Soviet Union acceded to the Convention.<sup>49</sup>

In *Kamibayashi*, the plaintiffs had all been repatriated before this "magic date," November 10, 1954.<sup>50</sup> Thus, one issue on appeal is whether Articles 66 and 68 of the 1949 Third Geneva Convention can apply retroactively to the plaintiffs' case.<sup>51</sup>

Article 28 of another international agreement, the Vienna Convention on the Law of Treaties,<sup>52</sup> directly addresses this issue of retroactivity. It provides that:

[U]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to an act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with regard to that party.<sup>53</sup>

As a general rule, therefore, a treaty does not apply retroactively unless a contrary procedure is (1) stated in the treaty itself, or, is (2) intended by the contracting parties.<sup>54</sup>

The only article in the 1949 Third Geneva Convention which refers to the issue of retroactivity is Article 141. It provides that the Convention will apply to armed conflicts and wars before, as well as after, a

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49. See 1949 Third Geneva Convention, *supra* note 2, art. 2. The relevant part of Article 2 reads:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. *They shall furthermore be bound by the Convention in relation to said Power, if the latter accepts and applies the provisions thereof.*

*Id.* (emphasis added). The Soviet Union did not become a "mutual" party with Japan until November 10, 1954. The last sentence of Article 2 does not bind Japan to the Convention in its relations with the Soviet Union until this date. See also *supra* note 4 (explaining the ambiguous meaning of the term "effective date").

50. *Kamibayashi*, 29 I.L.M. at 403.

51. *Id.* at 403: "[T]he question remains whether provisions of these Articles shall apply to those who have lost their status as prisoners of war before the effective date of the Convention." *Id.*

52. Vienna Convention, *supra* note 32.

53. *Id.*

54. *Kamibayashi*, 29 I.L.M. at 403 (explaining the rule established by Article 28 of the Vienna Convention on the Law of Treaties).



State's ratification or accession.<sup>55</sup> The Article says nothing about how the Convention will apply to repatriation that is completed before ratification or accession.<sup>56</sup>

The Tokyo District Court interpreted the 1949 Third Geneva Convention's silence on this point as a denial of retroactivity of Articles 66 and 68.<sup>57</sup> While this may appear to be a conservative interpretation of the treaty, it is actually required by the language of Article 28 of the Vienna Convention. Silence can not be construed as an "intention . . . [of] the treaty"<sup>58</sup> permitting non-application of the general principle which prohibits retroactivity.<sup>59</sup>

The Court also held that an intent of the contracting parties to apply Articles 66 and 68 retroactively could not be ascertained.<sup>60</sup> Therefore, "[retroactivity] was not [and could not be] otherwise established."<sup>61</sup> Since most POWs after World War II had been repatriated by 1947,<sup>62</sup> it can be assumed that contracting parties to the 1949 Third Geneva Convention were well aware of the fact that Articles 66 and 68, providing the POWs with compensation from the Power of Origin, would not apply to most of the POWs of World War II.<sup>63</sup> Notwithstanding the Vienna Convention's general principle of non-retroactivity,<sup>64</sup> the Court concluded that the contracting parties would have explicitly provided for retroactivity of these Articles if they had so intended.<sup>65</sup>

The Court reasoned that if the plaintiffs had been detained until November 10, 1954, they could have reaped the benefits of compensation from the Power of Origin provided in Articles 66 and 68.<sup>66</sup> The timing of their release from captivity, however, precluded the plaintiffs from invoking provisions of the 1949 Third Geneva Convention.<sup>67</sup>

55. See 1949 Third Geneva Convention, *supra* note 2, art. 141.

56. See *id.* See also *Kamibayashi*, 29 I.L.M. at 404.

57. *Kamibayashi*, 29 I.L.M. at 404.

58. Vienna Convention, *supra* note 32.

59. The language of Article 28 dictates this conclusion. See *id.*

60. *Kamibayashi*, 29 I.L.M. at 405.

61. Vienna Convention, *supra* note 32.

62. See *supra* note 14 and accompanying text.

63. See generally *Kamibayashi*, 29 I.L.M. at 404-05 (stating that German, British, French, and most Japanese POWs who were captive in the Soviet Union had been repatriated before 1949).

64. See *supra* text accompanying notes 53-54.

65. *Kamibayashi*, 29 I.L.M. at 405.

66. By that time, the 1949 Third Geneva Convention would have taken effect between Japan and the Soviet Union. *Id.* at 396.

67. *Id.*

## 2. Determining the Law When Desired Provisions are Non-Retroactive

Prior to ratification of the 1949 Third Geneva Convention, the conventional law relating to POWs that was applicable to Japan included the 1929 Geneva Convention<sup>68</sup> and its predecessor, the 1907 Hague Convention IV With Respect to the Laws and Customs of War on Land (1907 Hague Regulations).<sup>69</sup> The Soviet Union, which never ratified the 1929 Geneva Convention, was a party only to the 1907 Hague Regulations.<sup>70</sup> Neither of these conventions, however, provided for the form of compensation sought by the plaintiffs.

The 1907 Hague Regulations placed the responsibility for the payment of credit balances of POWs after repatriation on the Detaining Power.<sup>71</sup> The 1929 Geneva Convention provided for the same, absent a contrary agreement by the belligerents.<sup>72</sup> Notwithstanding the fact that the Soviet Union was not a party to the 1929 Geneva Convention, no agreement on the payment of POW credit balances upon repatriation was ever made between Japan and the Soviet Union.<sup>73</sup> Therefore, the Soviet Union, as the Detaining Power, was required to pay POW wage balances when captivity ceased.<sup>74</sup>

With regard to compensating injuries after repatriation, the 1929 Geneva Convention required the former Detaining Power to provide for continued payment of repatriated POWs under its domestic worker's compensation system.<sup>75</sup> Because the Soviet Union was not a party to the 1929 Geneva Convention and this provision could not be imposed

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68. See *supra* notes 34-36 and accompanying text.

69. See THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 96 (D. Schindler and J. Toman, eds. 1988) (listing Japan as a party to the 1907 Hague Convention) [hereinafter ARMED CONFLICTS].

70. See *Id.* at 97 n.1 (indicating the Soviet Union's ratification of the 1907 Hague Convention). See also *supra* note 35 (stating that the Soviet Union was not a party to the 1929 Geneva Convention).

71. Hague Convention No. IV Respecting the Laws and Customs of War on Land (with Annexed Regulations), October 18, 1907, art. 6, 36 Stat. 2277, T.S. No. 539, Bevans 631 [hereinafter 1907 Hague Regulations].

72. See 1929 Geneva Convention, *supra* note 38, art. 34.

73. See LEVIE, *supra* note 35, at 202 (stating that no agreements with regard to wages were ever made between belligerents during World War II, with the exception of a limited agreement between Italy and the United States in 1942).

74. See 1907 Hague Regulations, *supra* note 71. All Detaining Powers, including those subject to the 1929 Geneva Convention who did not otherwise agree, were required to pay accrued wages to POWs upon repatriation.

75. Opinion of Professor Levie, *supra* note 13, at 59. See also 1929 Geneva Convention, *supra* note 38, art. 27.

on it as a matter of customary international law,<sup>76</sup> the 1907 Hague Regulations governed the plaintiffs' claim for compensation of work-related injuries.<sup>77</sup> Unfortunately, these regulations did not address compensation of work-related injuries.<sup>78</sup> Therefore, the prevailing law of international conventions did not require Japan, the Power of Origin, to compensate her nationals for work-related injuries upon repatriation.<sup>79</sup>

Without any applicable conventional law to support their claims against the Japanese Government, the plaintiffs' only hope for any recovery based on international law depended on the existence of customary international law.<sup>80</sup>

## *B. Customary International Law*

### 1. Elements Required

If the Court had found that Articles 66 and 68 of the Third Geneva Convention were a codification of prevailing customary law, the legal requirement set forth in the articles would have been applied to the plaintiffs in *Kamibayashi*.<sup>81</sup> Custom is a source of international law in itself, separate from conventional law, that courts are required to apply when settling disputes.<sup>82</sup> Therefore, even without the retroactivity

76. See *infra* notes 162-67 and accompanying text (explaining that the mandate of Article 27 is not a matter of customary international law).

77. See ARMED CONFLICTS, *supra* note 69, at 339. The 1929 Geneva Convention did not replace, but rather, only complimented provisions of the 1907 Hague Regulations. For the States that did not ratify the 1929 Convention, the 1907 Hague Regulations continued to govern. See *id.*

78. LEVIE, *supra* note 35, at 249.

79. See *Id.*

80. After rejecting the applicability of the 1949 Third Geneva Convention to the plaintiffs' case, the Court then considered the mandates of customary international law. See *Kamibayashi*, 29 I.L.M. at 407. Customary international law, here, refers to the law that had been established by the end of World War II and before formulation of the 1949 Third Geneva Convention when the plaintiffs had completed repatriation. See *generally supra* note 5.

81. Cf. THE UNITED NATIONS WAR CRIME COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 88 (a reproduction of *United States v. Wilhelm von Leeb*). The court upheld a prior decision of the International Military Tribunal and accepted as international law that "the [1929] Geneva Convention was not binding as between Germany and Russia as a contractual agreement but that the general principles of international law as outlined in those conventions were applicable." *Id.* at 534. In the case at bar, it would follow that, although the 1949 Geneva Convention was not binding as a contractual agreement between Japan and the Soviet Union at the time of the plaintiffs' repatriation, the general principles of international law as outlined in that Convention were still applicable. See *id.*

82. Statute of the International Court of Justice, art. 38 (1945); R. MILLER, THE

of Articles 66 and 68, the Japanese Government could have been held liable for compensation to its nationals for wages and injuries after repatriation if such compensation was otherwise required as a matter of customary international law.<sup>83</sup>

Article 38 (1)(b) of the Statute of the International Court of Justice defines "international custom" as "evidence of a general practice accepted as law."<sup>84</sup> From this definition, the Tokyo District Court correctly recognized that there were two distinct elements necessary to prove the existence of customary law with regard to compensation by the Power of Origin: (1) "general practice"; and (2) "accept[ance] as law", often referred to as *opinio juris*.<sup>85</sup> In order for customary international law to hold Japan liable for compensation, the plaintiffs had to show that nations, in general, were providing compensation for wages and injuries after repatriation to their own nationals by the end of World War II and at the time that the plaintiffs completed repatriation. The plaintiffs also had to establish that the nations were motivated to provide such compensation by a sense of legal obligation.<sup>86</sup>

## 2. Codifications

Since the mid-nineteenth century, attempts were made to codify customary laws of war that related to POWs.<sup>87</sup> Lieber's Instructions for the Government of Armies of the United States in the Field (Lieber Instructions)<sup>88</sup> in 1863 were the first attempt at such a codification.<sup>89</sup> Although the Lieber Instructions only had binding force on the United States, they corresponded to the customs of war existing at the time and strongly influenced further codifications.<sup>90</sup> The Brussels Convention

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LAW OF WAR 9 (1975) (stating that "customary law continues to exist side by side with treaty [conventional] law . . ."); see also *The Paquete Habana*, 175 U.S. 677 (1900) (discussing the need for courts to take judicial notice of customary law).

83. See generally Statute of the International Court of Justice, art. 38 (1945).

84. *Id.*

85. *Kamibayashi*, 29 I.L.M. at 426 (quotations are taken from Article 38, which the court is discussing).

86. See R. MILLER, *THE LAW OF WAR* 10 (1975). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102 (1986): "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."

87. See LEVIE, *supra* note 35, at 213-218 (discussing the history of labor provisions of the 1949 Third Geneva Convention).

88. *Armed Conflicts*, *supra* note 69, at 3 (reproduction of the document itself).

89. *Id.* (introductory note) at 3.

90. *Id.*

of 1874,<sup>91</sup> though never ratified,<sup>92</sup> and the 1880 Oxford Manual<sup>93</sup> represented other important steps in the movement for codification of the laws of war.<sup>94</sup> Moreover, the 1907 Hague Convention<sup>95</sup> was found to be "declaratory of the laws and customs of war."<sup>96</sup>

Selected provisions of a Convention can also be viewed as a codification of custom. For example, in *United States v. Wilhelm von Leeb* (The High Command Case),<sup>97</sup> the United States Military Tribunal enumerated specific articles of the 1929 Geneva Convention which represented customary international law.<sup>98</sup> In so doing, it provided that the enumerated articles were binding on a nation that was not a party to the Convention "insofar as they were in substance an expression of international law as accepted by the civilized nations of the World . . . ."<sup>99</sup>

Consequently, any article of the 1949 Third Geneva Convention, standing alone, could be interpreted as a declaratory provision codified in the law.<sup>100</sup> The Tokyo District Court erred in its analysis of customary international Law by failing to consider this possibility. The *Kamabayashi* court examined custom with regard to both Articles 66 and 68 together, under a unified "Principle of Compensation by the State of the Origin" when it held that neither article codified custom.<sup>101</sup> Instead, the Court should have analyzed each article independently to determine whether either article standing alone represented a codification of existing customary law. Had the Court made a separate analysis of each article, it would have held that Article 68 codified prevailing customary law.

91. *Id.* at 25.

92. *Id.* (introductory note) at 25.

93. *Id.* at 35.

94. *Id.* at 25.

95. 1907 Hague Regulations, *supra* note 71.

96. ARMED CONFLICTS, *supra* note 69, at 3 (citing from an excerpt on judicial decisions in 41 A.J.I.L. 248-49); *See also*, THE UNITED NATIONS WAR CRIME COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 87 (1949) [hereinafter LAW REPORTS] (stating that the Hague Convention was "declaratory of existing International Law").

97. LAW REPORTS, *supra* note 96.

98. *Id.* Among those enumerated, were Articles 2, 4, 10, 11, 12, 13, 29, 32, 46 and 50. *Id.*; *See also* Opinion of Professor Levie, *supra* note 13, at 15.

99. LAW REPORTS, *supra* note 96, at 88.

100. Specifically enumerated articles of a Convention can represent customary law. *See Id.*

101. *See Kamibayashi*, 29 I.L.M. at 407.

## IV. ANALYSIS

A. *Payment of Credit Balances & Article 66*

## 1. The Obligation to Pay Wages

The Lieber Code, the earliest codification dealing with prisoner-of-war labor, did not provide for any type of wage payments to POWs.<sup>102</sup> Historically, belligerents were reluctant to utilize POW labor.<sup>103</sup> By providing that POWs "may be required to work for the benefit of the captor's government,"<sup>104</sup> the Lieber Code attempted to overcome this reluctance. Since there was little, if any, practice of POW employment,<sup>105</sup> no wage-payment custom developed at that time.

By 1874, Article 25 of the Brussels Declaration<sup>106</sup> provided for the Detaining Power to pay wages to POWs during their detainment "towards improving their position"<sup>107</sup> or on their release.<sup>108</sup> Six years later, Article 72 of the Oxford Manual placed the same responsibility on the Detaining Power.<sup>109</sup> Again, and more plainly, Article 6 of the 1907 Hague Regulations obligated the Detaining Power to assume any wage credit balance (after deducting the cost of maintenance) when POW captivity terminated.<sup>110</sup> These early codifications, from the 1874 Brussels Conference through the 1907 Hague Convention, show a growing international recognition of the obligation on the captor state to satisfy POW credit balances.<sup>111</sup>

Article 34 of the 1929 Geneva Convention, which was applicable to most POWs who were released from captivity after World War

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102. See ARMED CONFLICTS, *supra* note 69, at 3 (reviewing the articles of the Lieber Code shows that no wage-payment provision was included).

103. See LEVIE, *supra* note 35, at 214.

104. ARMED CONFLICTS, *supra* note 69 at 13 (citing Article 76 of the Lieber Code).

105. LEVIE, *supra* note 35, at 214.

106. ARMED CONFLICTS, *supra* note 69, at 25 (providing a reproduction of the Brussels Declaration).

107. *Id.* at 30.

108. *Id.*

109. See ARMED CONFLICTS, *supra* note 69, at 46 (reproducing the Manual).

110. 1907 Hague Regulations, *supra* note 71, art. 6.

111. During World War I, which was governed by the 1907 Hague Regulations, the United States and Germany entered into an agreement concerning POWs. Article 51 of that agreement specifies the amount of wages owed by the captor state. See Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, Berne, November 11, 1918, 224 Parry, Consolidated Treaty Series 231, *quoted in* DOCUMENTS ON PRISONERS OF WAR 115 (H. Levie ed. 1979) [hereinafter DOCUMENTS].

II,<sup>112</sup> left the manner in which POWs were to collect wages up to the agreement of the belligerents.<sup>113</sup> Absent such agreements, however, compensation for work performed for the Detaining Power was to be based on a formula similar to that set out in Article 6 of the 1907 Hague Regulations. The Detaining Power credited wages to the POW's account during captivity, but payment of the credit balances had to be remitted to the POW upon his release.<sup>114</sup> With the exception of the Italo-American Agreement of December 1941 to June 1942, no agreements between belligerents as required by the 1929 Geneva Convention were ever concluded.<sup>115</sup> Consequently, the payment procedure in Article 6 of the Hague Regulations applied in both World Wars I and II with regard to the payment of credit balances.<sup>116</sup> The Detaining Power continued to be responsible for paying the credit balances of POWs on their release.

Few Detaining Powers actually complied with the requirement of satisfying credit balances of POWs upon their repatriation.<sup>117</sup> A reason frequently cited for the Detaining Powers' non-compliance was the existence of import and export controls on foreign currency and the resulting fear that an influx of foreign currency could create a black market in the territories of the Powers of Origin of the returning POWs.<sup>118</sup> Another reason cited for non-compliance was that non-victors of the war were sometimes left in such poor financial and administrative condition that they could not afford to pay their former POWs.<sup>119</sup> Nevertheless, the law only obligated the Detaining Power to compensate POWs for work performed in captivity.<sup>120</sup>

112. *See supra* note 34.

113. *See* 1929 Geneva Convention, *supra* note 38.

114. *See id.*

115. LEVIE, *supra* note 35, at 202.

116. Opinion of Professor Levie, *supra* note 13, at 131.

117. *See* LEVIE, *supra* note 35, at 216: "[M]any of the protective provisions of the 1929 Convention (and of the 1907 Hague Regulations which it complemented) were either grossly distorted or simply disregarded." *See also* Rundell, *supra* note 34, at 121 in which the United States is compared to Axis Powers, who "were not so meticulous in following the provisions of the treaty when paying American prisoners of war." *Id.*

118. *See* Opinion of Professor Levie, *supra* note 13, at 134. *See also* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIA, § 548 (recognizing the problem caused by import or export restrictions imposed by most States) [hereinafter Final Record].

119. *See* Opinion of Professor Levie, *supra* note 13, at 139 (referring to nations in such a position as "vanquished").

120. *Kamibayashi*, 29 I.L.M. at 416-422. The Tokyo District Court refers to a few States, including the United States and the United Kingdom, which took it upon themselves to compensate their own nationals for accrued wages. In particular, *see id.*

Great Britain and Germany entered into a unique agreement as an attempt to alleviate such problems. The agreement required each of the parties to settle the accounts of their own nationals who had been captive in the other's territory.<sup>121</sup> In essence, it provided for the Power of Origin to compensate its own nationals.<sup>122</sup> However, this agreement was never enforced because of Germany's inability to compensate its own nationals after its unconditional surrender in World War II.<sup>123</sup> Knowing that the International Committee of the Red Cross<sup>124</sup> would take action on behalf of the unpaid German POWs, Great Britain did not seek strict enforcement of the agreement, but adopted another policy to provide German POWs payment without delay.<sup>125</sup> Similarly, the United States and France provided payment of credit balances for German POWs released by them.<sup>126</sup> The obligation to pay credit balances once again landed on the Detaining Power. Many German POWs held in France, Great Britain and the United States were fortunate enough to obtain payment of wages from the Detaining Power.<sup>127</sup> These fortunate POWs, however, represented only a small minority of all the individuals held as POWs during and after World War II.<sup>128</sup>

## 2. Article 66 of the 1949 Third Geneva Convention: Shifting the Obligation

Because most Detaining Powers did not compensate POWs for their labor, conferences which culminated in the 1949 Third Geneva Convention considered shifting the responsibility of paying POW credit balances onto the Power of Origin.<sup>129</sup> No firm agreement to adopt this change was made in the early conferences. As a result, the Stockholm

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at 423-26, where the Court emphasized that, although Japan compensated Japanese POWs who had been repatriated from Australia, New Zealand, Southeast Asia, and the United States, she did so under the instruction of the General Headquarters, not under an obligation of international law.

121. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR, Vol. I, 286-289 (1948) [hereinafter REPORT OF THE ICRC].

122. *See id.*

123. *Id.*

124. The International Committee of the Red Cross (ICRC) is an internationally recognized protective agency that takes action on behalf of POWs. For a discussion of the history and significance of the ICRC, *see* LEVIE, *supra* note 35, at 307-311.

125. *See* REPORT OF THE ICRC, *supra* note 121.

126. *Id.*

127. Opinion of Professor Levie, *supra* note 13, at 136.

128. *Id.*

129. *See* Final Record, *supra* note 118, § 282.



draft<sup>130</sup> continued to contain the 1929 Geneva Convention's provision, namely, "that the credit balance should be paid in cash by the Detaining Power."<sup>131</sup> Some delegations to the Third Geneva Convention insisted that the provision in the Stockholm draft, like the provision in Article 34 of the 1929 Convention, should be left unchanged.<sup>132</sup> Other delegations thought that the Detaining Power and the Power of Origin should have joint responsibility for settling credit balances on the POW's release.<sup>133</sup> This points to the fact that when POWs of World War II were released from captivity and repatriated, the applicable international law continued to place the legal obligation for settling credit balances on the Detaining Power.<sup>134</sup>

Article 66 of the 1949 Third Geneva Convention, which requires the Power of Origin to settle any credit balance of a POW's account,<sup>135</sup> was a "new" conventional provision<sup>136</sup> that was not itself mandated by customary international law.<sup>137</sup> Prior to the 1949 Third Geneva Con-

130. The Stockholm draft resulted after two years of preliminary conferences as to the provisions of the 1949 Third Geneva Convention and was adopted by the ICRC in 1948. *See* DOCUMENTS, *supra* note 111, at 422.

131. Final Record, *supra* note 121, §282. There was still no agreement to the effect that the Power of Origin should be obligated to bear the burden of settling its nationals' credit balances. *See infra* notes 132-34 and accompanying text.

132. *See* Final Record, *supra* note 118, § 548 in which General Parker of the U.S. is quoted: "[T]he purpose of the Convention was to ensure the protection of the prisoners' interests rather than those of their Government." *Id.*

133. *Id.* at § 4.

134. *See generally*, Opinion of Professor Levie, *supra* note 13, at 139.

135. *See* LEVIE, *supra* note 35, at 205 (explaining that the third paragraph of Article 66 places the responsibility on the Power of Origin and not the Detaining power to settle any certified balance of the POW's account).

136. Article 66 was a "new" conventional provision in the sense that it established a requirement that was never before mandated in conventional law:

Under the rule of the 1907 Hague Regulations and of the 1929 Geneva Prisoner-of-War Convention, the Detaining Power had this primary responsibility [to pay POW credit balances] and if it failed to meet that responsibility, for whatever reason, it was guilty of an international dereliction. Now [under Article 66 of the 1949 Third Geneva Convention] the Power of Origin has this responsibility and if it fails to meet that responsibility, for whatever reason, including lack of domestic legislation, it is guilty of an international dereliction.

Opinion of Professor Levie, *supra* note 13, at 141.

137. *Id.* at 154-55. Although some States may have paid the credit balances of repatriated members of their armed forces that were detained in another belligerent's territory, "there [was] not, and there could not [have been], any international obligation in this respect, which [was] a matter of domestic custom and law." *Id.* (emphasis added).

vention, any Powers which paid their own repatriated nationals<sup>138</sup> could not be said to have acted under a sense of international obligation (*opinio juris*). Making such payments would have purely been a matter of domestic custom or law.<sup>139</sup>

Based on this reasoning, the Japanese Government could not have been liable for compensation of credit balances of its repatriated nationals under the customary international law that existed before the 1949 Third Geneva Convention and at the time the plaintiffs were released from the Soviet Union. Therefore, the Tokyo District Court was correct in holding that customary international law did not support the plaintiffs' claim for compensation of wages from the Japanese Government, the Power of Origin. Customary international law required the Detaining Power, in this case the Soviet Union, to satisfy the plaintiffs' credit balances. The Soviet Union's failure in this regard violated customary international law.<sup>140</sup>

### B. *Compensation for Injuries & Article 68*

#### 1. The 1907 Hague Regulations: Custom Rules

Early codifications of customary international law did not provide any guidance as to which belligerent, the Detaining Power or the Power of Origin, should provide compensation to POWs who sustained work-related injuries.<sup>141</sup> The 1907 Hague Regulations which governed the conduct of belligerents during World War I were also silent on this problem.<sup>142</sup> Necessarily, belligerents had to enter into ad-hoc agreements to address this and other deficiencies in the 1907 Hague Regulations.<sup>143</sup>

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138. See, e.g., *supra* note 120.

139. See *supra* note 137. While this case note only concerns itself with international custom and law, see source cited at *supra* note 1 for information on domestic law in Japan.

Having established that the burden to satisfy credit balances rests on the Detaining Power, there is a lingering question as to whether or not Japan is vicariously liable for the Soviet Union's failure in this regard. See Opinion of Professor Levie, *supra* note 13, at 160 (explaining that this is an issue of domestic law).

140. Note, however, that Japan absolved the Soviet Union from liability by signing the Joint Declaration. See *supra* text accompanying note 22.

141. See generally, ARMED CONFLICTS, *supra* note 69, at 3-48 (reproducing all of the provisions of the Lieber Instructions, the Brussels's Convention, and the Oxford Manual, none of which contain any mention of the compensation for injury).

142. See LEVIE, *supra* note 35, at 249.

143. See *Kamibayashi*, 29 I.L.M. at 411. See also DOCUMENTS, *supra* note 111, at 86.

The Tokyo District Court analyzed two such agreements: (1) the 1918 Agreement between the British and German Governments Concerning Prisoners of War and Civilians (UK-Germany Agreement), and (2) the 1918 Agreement between the United States of America and Germany Concerning Combatant Prisoners of War, Sanitary Personnel, and Civilians (US-Germany Agreement).<sup>144</sup> Both Article 32 of the UK-Germany Agreement<sup>145</sup> and Article 92 of the US-Germany Agreement<sup>146</sup> stated that the Detaining Power merely had to provide the injured POW with a certificate upon his release. The injured POW was then to present his certificate to the Power of Origin in making a claim against that Power for work-related injuries.<sup>147</sup> These agreements, which placed the final responsibility on the Power of Origin to compensate its own nationals for injuries after repatriation, "represented the customary practice of States at a time when they were subject solely to the 1907 Hague Regulations in their treatment of prisoners of war."<sup>148</sup>

Prior to these agreements, the 1917 Copenhagen Convention<sup>149</sup> had adopted the "Russian Proposal,"<sup>150</sup> which required the Detaining Power to provide for injured POWs in the same manner as it provided for its own injured citizens.<sup>151</sup> The procedure called for by the Russian Proposal, however, was contrary to general practice and customary law. Subsequent agreements between belligerents, as discussed above, rejected the approach taken in the Russian proposal. In addition, the problems created by Article 27 of the 1929 Geneva Convention, which adopted the Russian proposal, proved that this procedure was confusing and radically departed from prevailing practices.<sup>152</sup>

## 2. Article 27 of the 1929 Geneva Convention: The Unworkable Requirement

Article 27 of the 1929 Geneva Convention, which governed most

144. *Kamibayashi*, 29 I.L.M. at 411-12.

145. The Hague, July 14, 1918, Parl. Papers, Misc No. 20 (1918); 111 BFSP 279.

146. Bern, November 11, 1918, [1918] For. Rel. U.S., The World War, Supp. 2, at 103 (1933); 13 A.J.I.L. Supp. 1.

147. See Opinion of Professor Levie, *supra* note 13, at 58-59.

148. *Id.*

149. Arrangements concernant les prisonniers de guerre entre l'Allemagne, l'Autriche-Hongrie, la Roumanie, la Russie, et la Turquie, Copenhagen, November 2, 1917, Archives of the International Committee of the Red Cross (in French).

150. See LEVIE, *supra* note 35, at 249.

151. *Id.*

152. See *infra* text accompanying notes 153-67.

belligerents during World War II, attempted to bring the repatriated POW under the worker's compensation system of the Detaining Power.<sup>153</sup> Great confusion arose when States tried to carry out this provision. For example, only after "elaborate negotiations with the United Kingdom"<sup>154</sup> did Germany manage to pass special legislation to implement this procedure.<sup>155</sup> The United States also had to alter its prevailing legislation in order to establish a similar policy for providing compensation to POWs under its domestic insurance regulations.<sup>156</sup>

The United Kingdom, concluded, after "lengthy negotiations [with Germany and Italy] as to the correct meaning of Article 27,"<sup>157</sup> that "its domestic Worker's Compensation legislation was too complex and so bound up with the conditions of free civilian workers as to make it impracticable to apply it to prisoners of war."<sup>158</sup> The British government viewed its obligation under Article 27 as simply a requirement to provide the injured POW with all necessary medical attention, clothing, food, and accommodations during the POW's internment. This was thought to be equivalent to the types of benefits received by injured British workers.<sup>159</sup> No compensation payments were provided to repatriated POWs by the United Kingdom.<sup>160</sup> The United Kingdom's practice reflected the general policy that States actually carried out during World War II.<sup>161</sup>

The lengthy, elaborate and sometimes unsuccessful<sup>162</sup> negotiations that were necessary to interpret the correct meaning of Article 27, as well as the need to enact special legislation in order to comply with the article,<sup>163</sup> indicated that Article 27's mandate was contrary to the customary international law that prevailed at the time.<sup>164</sup> Obvious efforts to eradicate Article 27 further demonstrated that Article 27 (and the Russian Proposal) did not conform with prevailing customary interna-

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153. See *supra* note 75 and accompanying text.

154. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L 360, 373 (1952).

155. *Id.*

156. See LEVIE, *supra* note 35, at 250.

157. Opinion of Professor Levie, *supra* note 13, at 61 (citing United Kingdom War Office, *The Law of War on Land*, #185 n.1 (1958)).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. See *supra* text accompanying notes 157-58 (illustrating that the United Kingdom could not reach an agreement).

163. See *supra* text accompanying notes 154-56.

164. See Opinion of Professor Levie, *supra* note 13, at 59.

tional law.

Before 1947, the International Red Cross explicitly reported that Article 27 of the 1929 Geneva Convention was "inapplicable in practice [when] the effect of the accident extended beyond repatriation of [the] POW."<sup>165</sup> The Final Record of the Diplomatic Conference of Geneva of 1949 later re-emphasized that the compensation system described in Article 27 was "impossible to apply in practice."<sup>166</sup> Moreover, despite the stipulation of Article 27, no payments were ever actually made to injured POWs by the former Detaining Powers after the POWs' repatriation.<sup>167</sup>

### 3. General Practice

Throughout World Wars I and II, the Power of Origin compensated POWs for injury after repatriation even without a certificate from the Detaining Power. In the United States, statutes have been enacted since 1789 which provided for payment of pensions for those injured in its military forces during war.<sup>168</sup> Currently, the Wartime Disability Compensation Act provides such relief for members of the U.S. armed forces who are "released under conditions other than dishonorable,"<sup>169</sup> which includes injured POWs who were repatriated.

Great Britain also enacted various statutes on the subject since the nineteenth century.<sup>170</sup> The British Royal Warrant of May 24, 1949 provides compensation for injuries to any member of the British military forces who suffers from an industrial accident while a POW.<sup>171</sup>

Similarly, France has compensated its injured nationals who were POWs since at least 1831.<sup>172</sup> The Tokyo District Court specifically cited the Laws of April 11, 1831 and of April 18, 1831, which created

165. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, Geneva, April 14-26, 1947, at 173-74 (Series I, 5B) [hereinafter REPORT OF GOVERNMENT EXPERTS].

166. Final Record, *supra* note 118, at 55 (setting forth the statement of Mr. Gardner from the United Kingdom).

167. See LEVIE, *supra* note 35, at 250.

168. See Opinion of Professor Levie, *supra* note 13, at 156 where it is stated that the First Session of the First Congress of the United States enacted such a statute in 1789 (1 United States Stat. at Large 95).

169. 38 U.S.C. § 310 (1979).

170. Opinion of Professor Levie, *supra* note 13, at 157.

171. *Id.*, citing CONGRESS, HOUSE COMMITTEE ON VETERANS' AFFAIRS, SURVEY OF BENEFITS GRANTED TO VETERANS BY FOREIGN COUNTRIES 479 (1960) [hereinafter SURVEY OF BENEFITS].

172. See *Kamibayashi*, 29 I.L.M. at 417.

pension systems for French military personnel.<sup>173</sup> The French Law of March 31, 1919, which applied retroactively, limited the scope of compensation to cases of illness and injury. This French Law was supplemented by the Law of June 24, 1919, which also compensated civilian victims of war.<sup>174</sup> After World War II, France promulgated a comprehensive codification of law related to compensating former POWs from France. There are presently four different kinds of compensation available for former POWs of French origin.<sup>175</sup>

Germany provides disability compensation payments for those injured during wartime military service, which is defined to include "time of imprisonment or internment."<sup>176</sup> The *Kamibayashi* court specifically cited three laws that provided assistance and compensation to German POWs and were enacted after World War II: the law concerning livelihood assistance to the families of prisoners of war (June 13, 1950), the law concerning aid to repatriated soldiers of West Germany (June 19, 1950), and the law concerning compensation to former German prisoners of war (January 30, 1954).<sup>177</sup>

Canada has also compensated its nationals. Since 1946, Canadian law granted pensions to all former POWs who had been detained in Japan.<sup>178</sup> The Compensation for Former Prisoners of War Act, enacted on May 5, 1976, expanded the scope of compensation to include former POWs that had been held captive in other States.<sup>179</sup>

The Tokyo District Court, in addition, mentioned that Austria compensated its injured nationals who were POWs through the 1957 Austrian War Victims Aid Act and the 1958 Austrian Federal Law concerning Economic Aid to Later Repatriated Soldiers.<sup>180</sup>

In sum, belligerents during both World Wars followed customary international law. The Detaining Power was responsible for providing care for the injured POW during his captivity, but after repatriation, the responsibility shifted to the Power of Origin.

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173. *Id.*

174. *Id.*

175. *Id.* at 418-19 (listing and explaining the four types of compensation presently granted in France).

176. SURVEY OF BENEFITS, *supra* note 171, at 55.

177. See *Kamibayashi*, 29 I.L.M. at 420.

178. *Id.* at 419.

179. *Id.*

180. *Id.* at 421.

#### 4. Article 68 of the 1949 Third Geneva Convention: Codifying Longstanding Customary International Law

Because Article 27 was ineffective and never followed by belligerents, the International Committee of the Red Cross recommended that it be replaced in the 1949 Third Geneva Convention with a stipulation for the "Home Country" to compensate members of its armed forces for work-related injuries persisting after repatriation.<sup>181</sup> In approving the deletion of Article 27 and the insertion of such a stipulation, the Commissioner recognized that this stipulation was, in fact, the view of customary international law and was the practice followed by belligerents.<sup>182</sup>

Article 54 [2] of the 1949 Third Geneva Convention requires the Detaining Power to provide POWs, who have been injured in work-related activity, with all necessary care during their captivity.<sup>183</sup> It further requires the Detaining Power to provide the injured POWs with a certificate upon their release to "enable them to submit their claims to the Power on which they depend [Power of Origin] . . . ."<sup>184</sup> Article 68 [1] adds the requirement that "any claim by a prisoner of war for compensation in respect of an injury or other disability arising out of work shall be referred to the Power on which he depends [Power of Origin] . . . ."<sup>185</sup> These two provisions of the 1949 Third Geneva Convention return to the pre-1929 procedure for compensating injured POWs.

The Home Country's obligation, pursuant to Article 68, is best summarized as follows:

Both prior customary international law and the provisions of the 1949 Third [Geneva] Convention contemplate that, based upon the facts certified, the Power of Origin will then [after repatriation] take the necessary action under its domestic laws to ensure appropriate compensation to its injured nationals; and that if it lacks applicable laws, it will enact them.<sup>186</sup>

This was the longstanding practice of belligerents which was ultimately codified in Articles 68 of the 1949 Third Geneva Convention.<sup>187</sup>

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181. See REPORT OF GOVERNMENT EXPERTS, *supra* note 165.

182. *Id.*

183. See 1949 Third Geneva Convention, *supra* note 2.

184. *Id.*

185. *Id.* at art. 68.

186. Opinion of Professor Levie, *supra* note 13, at 68.

187. *Id.* at 159.

### 5. The *Kamibayashi* Court's Error

International law relating to compensation of wages is distinct from international law relating to compensation for injuries. Just as Conventions have assigned separate articles to address these two types of compensation,<sup>188</sup> so too has customary international law established distinct requirements for each.<sup>189</sup> However, the Tokyo District Court consolidated its analysis of both types of compensation.<sup>190</sup> As a result, the District Court confused its examination of international law with regard to these two distinct obligations.

For instance, in analyzing historical trends, the Court compared Article 32 of the UK-Germany Agreement with Article 51 of the US-Germany Agreement.<sup>191</sup> Article 32 of the UK-Germany Agreement required the Detaining Power to give the injured POW a certificate upon his release so that the POW could make a claim for compensation for the injury against the Power of Origin.<sup>192</sup> However, Article 51 of the US-Germany Agreement was a wage-payment provision requiring the Detaining Power to pay the credit balance of a POW upon his release.<sup>193</sup> If the Court was analyzing compensation for injury, it should have instead focused on Article 92 of the US-Germany Agreement which related to injuries.<sup>194</sup> It then would have seen that both the UK-Germany and US-Germany Agreements had the same requirements with regard to compensating POWs for work-related injuries.<sup>195</sup> The Court never cited Article 92 of the US-Germany Agreement, nor did it

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188. See 1949 Third Geneva Convention, *supra* note 2 (having separate articles to address compensation of wages and compensation for injuries). See also 1929 Geneva Convention, *supra* note 38 (also having separate provisions addressing these two types of compensation).

189. Compare *supra* text accompanying notes 106-39 (establishing that customary international law requires the Detaining Power to compensate POWs for credit balances upon their release from captivity) with *supra* text accompanying notes 141-87 (establishing that customary international law required the Power of Origin to compensate POWs for injuries after their repatriation).

190. See *supra* note 101 and accompanying text.

191. *Kamibayashi*, 29 I.L.M. at 411-12.

192. Agreement between the British and German Governments Concerning Prisoners of War and Civilians, The Hague, July 14, 1918, art. 32, Parl. Papers, Misc No. 20 (1918); 111 BFSP 279.

193. See Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, Berne, November 11, 1918, art. 51, [1918] For. Rel. U.S., The World War, Supp. 2, at 103 (1933); 13 A.J.I.L. Supp. 1.

194. *Id.* at art. 92.

195. See *supra* text accompanying notes 145-47.



cite the similarity of the two agreements in providing compensation for injuries.

The mixing together of conventional provisions with regard to compensation of wages and injuries after repatriation prevented the *Kamabayashi* court from correctly recognizing the trend of customary international law relating to compensation for injuries after repatriation. Although the Court identified the procedure called for in Article 27 of the 1929 Geneva Convention as being similar to the Russian Proposal adopted in the Copenhagen Convention,<sup>196</sup> it was unable to determine that this procedure was contrary to existing customary requirements.<sup>197</sup> Moreover, in the Court's summary of the practice of compensation in which States engaged, it continued to mix compensation for working pay with compensation for work-related injury.<sup>198</sup>

Had the Court treated each type of compensation separately, it would have recognized that customary international law with regard to compensation for injuries required the Power of Origin to compensate its repatriated nationals.<sup>199</sup> Unlike the new wage-payment provision of Article 66, which was not grounded in international custom,<sup>200</sup> Article 68 was a codification of the longstanding customary international law that existed at the end of World War II and prior to the 1949 Third Geneva Convention.<sup>201</sup> If the Tokyo District Court had properly analyzed the two articles, it would have required the Japanese Government to compensate the injured plaintiffs.

#### V. *KAMIBAYASHI'S* IMPACT ON POW CLAIMS FOR COMPENSATION

If affirmed on appeal, the Tokyo District Court's decision in *Kamibayashi* will deny POWs a cause of action in customary international law against their Home Government for compensation of wages and injuries after repatriation. This result may not have a great impact on future POWs because most States have already ratified the 1949 Third Geneva Convention and the Convention has already taken effect in those States.<sup>202</sup> Former POWs from World War II, however, will be

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196. *Kamibayashi*, 29 I.L.M. at 412.

197. See *supra* notes 163-67 and accompanying text.

198. *Kamibayashi*, 29 I.L.M. at 416-22.

199. See *supra* text accompanying notes 106-40.

200. See *supra* text accompanying notes 136-37.

201. See *supra* text accompanying notes 186-87.

202. See ARMED CONFLICTS, *supra* note 69, at 557-562 (listing all of the States which have ratified the 1949 Geneva Conventions and their date of ratification). Most States ratified the Convention between 1949 and 1970. The most recent ratifications were in 1986, when Saint Christopher, Nevis, and Equatorial Guinea acceded to the

affected by *Kamibayashi's* decision if they were repatriated prior to the effective date of the 1949 Third Geneva Convention. These former POWs must rely on the existence of customary international law in order to be compensated for wages or injuries after repatriation.

POWs from the recent Persian Gulf War can take advantage of Articles 66 and 68 of the 1949 Third Geneva Convention. They can recover compensation from their Home Country for wages and injuries after repatriation. Because the States involved in the Persian Gulf War ratified the 1949 Third Geneva Convention many years ago,<sup>203</sup> the retroactivity of Articles 66 and 68 will not be an issue. Customary international law will not be necessary to support the claim of today's POWs since conventional law favors their position.

The former POWs from World War II, whose Home Country or Detaining Power did not ratify the 1949 Third Geneva Convention six months prior to their repatriation,<sup>204</sup> will continue to suffer if the *Kamibayashi* Court is affirmed. Assuming that their claims are not barred by a Statute of Limitations, former POWs from World War II will not have a claim against their Home Country for compensation of their wages or injuries after repatriation. The Court will deny that customary international law supports their claim against the Power of Origin for either type of compensation.<sup>205</sup>

## VI. CONCLUSION

POWs that were repatriated after World War II and before the effective date of the 1949 Third Geneva Convention cannot use the provisions of the Convention retroactively to seek compensation for their wages or for their work-related injuries suffered in captivity. In addition, customary international law does not provide them with any compensation for their wages from the Power of Origin. However, customary international law does provide injured POWs, as a subset of all

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Convention. *Id.*

203. The major States involved in the Persian Gulf War, including Iraq, France, Saudi Arabia, Syria, Italy, Kuwait, the United States and the United Kingdom, had ratified the 1949 Third Geneva Convention by 1957. *ARMED CONFLICTS*, *supra* note 69, at 557-62.

204. The Japanese POWs of World War II who were plaintiffs in this case are clearly an example of the former POWs who will suffer if the Tokyo District Court's decision is upheld.

205. *See, e.g., Kamibayashi*, 29 I.L.M. at 436 (stating that "the existence of customary international law as claimed by the Plaintiffs [former POWs from World War II whose former Detaining Power did not ratify the 1949 Third Geneva Convention prior to their repatriation] cannot be recognized").

wage-seeking POWs, with relief after repatriation for injuries from their Home Government. By merging its analysis of customary international law relating to compensation for wages with customary international law regarding compensation for injuries, the Tokyo District Court denied Japanese POWs that were detained in the Soviet Union relief for their injuries.

Present and future injured POWs will receive compensation from their Home Country for wages and injuries after repatriation pursuant to the provisions of the 1949 Third Geneva Convention. The *Kamabayashi* Court's decision will not affect future POWs. However, the Court creates a huge inequity with regard to former, injured POWs who can not avail themselves of the 1949 Third Geneva Convention and whose Home Countries refuse to voluntarily provide them compensation for wages and injuries after repatriation. Despite the prevailing customary practice after World War II, which placed the burden of compensating injuries after repatriation on the Power of Origin, the Tokyo District Court chose not to recognize this obligation as a matter of customary international law.

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