IV.—Prize Law

1.—Nature and Extent of Jurisdiction of Prize Courts

Warfare at sea—Prize law—Extent of jurisdiction of prize courts—Judgment of foreign prize court confiscating debt situate in forum State—Debt owed by German debtor represented by bonds issued in Germany and expressed in German currency—Bonds in England when confiscated by adjudication in prize—Whether English creditor deriving title from adjudication may claim recognition of title in Germany—Effect on creditor's claim of Convention on Settlement of Matters Arising out of the War and the Occupation, 1954—The law of Germany.

See p. 107 (*Adjudication in Prize of German Bonds Case*).

Warfare at sea—Prize law—Jurisdiction of prize courts—Nature and extent of—Review of decisions of prize courts of defeated belligerent under Peace Treaty—Review in conformity with international law—Peace Treaty with Japan, Article 15 (*a*).

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F—AIR WARFARE

Air warfare—Legality of nuclear weapons—Atomic bombing of Hiroshima and Nagasaki—Distinction between defended and undefended cities and areas—Legality of indiscriminate bombardment of undefended city or area—Hague Regulations, Article 25—Hague Convention on Bombardment by Naval Forces, Article 1—Draft Hague Rules of Air Warfare, 1923—Whether distinction between military and non-military objectives still valid—Dropping of atomic bomb equivalent to indiscriminate aerial bombardment—Legality of target-area bombardment—Whether atomic weapons are poisonous weapons—Whether they cause unnecessary injury—Waiver of claims in Article 19 of Treaty of Peace with Japan, 1951.

RYUICHI SHIMODA *ET AL.* *v.* THE STATE.

Japan, District Court of Tokyo. December 7, 1963.

(Koseki, Presiding Judge; Mibuchi and Takakuwa JJ.)

THE FACTS.—The plaintiffs, Japanese nationals, were all residents either of Hiroshima or of Nagasaki when atomic bombs were dropped on these cities by bombers of the United States Air Force in August 1945. Most of the members of their families were killed and many, including some of the plaintiffs themselves, were seriously wounded as a result of these bombings. The plaintiffs jointly brought the present action against the defendant, the State, for damages on the following grounds: (*a*) that they suffered injury through the dropping of atomic bombs by members of the Air Force of the United States of America; (*b*) that the dropping of atomic bombs as an act of hostilities was illegal under the rules of positive international law (taking both treaty law and customary law into consideration) then in force, for which the plaintiffs had a claim for damages; (*c*) that the dropping of atomic bombs also constituted a wrongful act on the plane of municipal law, ascribable to the United States and its President, Mr. Harry S. Truman; (*d*) that Japan had waived, by virtue of the provisions of Article 19 (*a*) of the Treaty of Peace with Japan of 1951, the claims of the plaintiffs under international law and municipal law, with the result that the plaintiffs had lost their claims for damages against the United States and its President; and (*e*) that this waiver of the plaintiffs' claims by the defendant, the State, gave rise to an obligation on the part of the defendant to pay damages to the plaintiffs.

The plaintiffs' cause of action was based, more specifically, on the provisions of Article 1 of the State Redress Law, which was applicable to the case of injury to a private person through an unlawful act of a government official; on the provisions of Article 29 of the Constitution, which provided for the obligation to pay just compensation in every case of expropriation of private property by the State for public use; and, finally, on unlawful infringement of the rights of the plaintiffs through the omission of the defendant to take appropriate measures for recovery of compensation.

Held: that the action must fail on the merits. The aerial bombardment with atomic bombs of the cities of Hiroshima and Nagasaki was an illegal act of hostilities according to the rules of international law. It must be regarded as indiscriminate aerial bombardment of undefended cities, even if it was directed at military objectives only, inasmuch as it resulted in damage comparable to that caused by indiscriminate bombardment. Nevertheless, the claimant as an individual was not entitled to claim damages on the plane of international law, nor was he able, as a result of the doctrine of sovereign immunity, to pursue a claim on the plane of municipal law. In these circumstances, the plaintiffs had no rights to lose as a result of the waiver contained in Article 19 (*a*) of the Treaty of Peace with Japan.

The Court said: " 1. *Evaluation of the act of bombing according to international law.*—(1) Whether an atomic bomb as a so-called nuclear weapon is permitted in international law or not is no doubt an important and very difficult question of international law. In the present case, however, the point at issue is whether the act of atomic bombing of Hiroshima and Nagasaki by the United States is to be regarded as illegal in the light of positive international law then in force. It will suffice here therefore to consider this point only.

" (2) As a preliminary for judging how the act of atomic bombing

referred to above is to be estimated in positive international law, we will begin by considering what are the rules of international law that have come into existence among modern States with regard to warfare, especially acts of hostilities, since the latter half of the nineteenth century.

" Listed chronologically, the following may be cited as relevant to the present case:

In 1868—St. Petersburg Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight.

In 1899—Convention relative to the laws and customs of war on land, concluded at the First Hague Peace Conference, and its annex, Regulations respecting the laws and customs of war on land.

Declaration concerning the prohibition of the use of bullets which expand or flatten.

Declaration concerning the prohibition of the launching of projectiles and explosives from balloons.

Declaration concerning prohibition of the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases.

In 1907—Convention relative to the laws and customs of war on land, which was concluded at the Second Hague Peace Conference (the revision of the Convention of the same name concluded at the First Hague Peace Conference).

Declaration concerning the prohibition of the launching of projectiles and explosives from balloons.

In 1922—Treaty relating to the use of submarines and noxious gases in warfare.

In 1923—Draft Rules of air warfare.

In 1925—Protocol for the prohibition of the use of asphyxiating, poisonous or other gases and bacteriological methods of warfare.

" (3) The rules contained in these instruments do not include any provisions directly touching upon the atomic bomb, a new weapon which appeared during the Second World War. On the strength of this fact, the defendant State argues that the question of violation of positive international law cannot arise, since the use of an atomic bomb was not expressly prohibited by positive international law inasmuch as there was neither a customary rule of international law nor treaty law prohibiting its use at that time.

" It can naturally be assumed that the use of a new weapon is legal as long as international law does not prohibit it. However, the prohibition in this context is to be understood to include not only the case where there is an express rule of direct prohibition, but also the case where the prohibition can be implied *de plano* from the interpretation and application by analogy of existing rules of international law (customary international law and treaties). Further, the prohibition must be understood also to include the case where, in the light of principles of international law which are at the basis of these positive rules of international law, the use of a new weapon is deemed

to be contrary to these principles, for there is no reason why the interpretation of rules of international law should be limited to literal interpretation, any more than the interpretation of rules of municipal law.

" (4) An argument is also advanced that a new weapon by its very nature cannot be subject to the regulation of international law at all, but the argument is as much unfounded as the one just referred to. Any weapon the use of which is contrary to the customs of civilized countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if it is not contrary to the principles of international law.

" Against this, some may argue that the invention and use of new weapons has always been objected to in various quarters, but that they have soon come to be regarded merely as more advanced weapons, and their prohibition has become altogether meaningless as with the progress in technology they turned out to be effective means of waging hostilities. This is testified by past history, and the atomic bomb is no exception.

" It is undeniable that often in the past although a new weapon was objected to, at its first appearance, in various interested quarters, it nevertheless came to be regarded as lawful with the advance of civilization and the development of science and technology. This may perhaps have been due to the fact that international law was still in an undeveloped state, that feelings of hostility were so strong against the enemy or the heathen, or else that the progress of weapons in general was so gradual. This, however, has not always been the case, as is evident from the existence of the Treaties prohibiting the use of dum-dum bullets and poisonous gases, referred to above. Thus, for a weapon to be legal it is not enough that it is a new weapon; and a new weapon must naturally be subjected to the examination of positive international law.

" (5) The next step is to examine the rules of international law of that time, relevant to the act of atomic bombing.

" The first question which arises is whether the act of atomic bombing is permissible under the rules of law respecting aerial bombardment, since such act constitutes aerial bombardment performed by military aircraft as an act of hostilities.

" No general treaty respecting aerial bombardment has been concluded. However, according to the customary rules generally recognized in international law concerning hostile acts, there is a distinction between a defended city and an undefended city with regard to bombardment by land forces, and between a defended area and an undefended area with regard to bombardment by naval forces. While indiscriminate bombing of a defended city or a defended area is permissible, in regard to an undefended city or an undefended

area only bombardment directed at combatants and military installations (military objectives) and not against non-combatants and non-military installations (non-military objectives) is permissible. Bombardment in breach of this principle is necessarily regarded as an illegal act of hostilities. The existence of such a principle is beyond doubt in view of the following provisions: Article XXV of the Hague Regulations respecting war on land, which provides that ' the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited '; Article I of the Convention concerning bombardment by naval forces in time of war, adopted at the Hague Peace Conference of 1907, which provides that ' the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden . . .'; and Article II, which lays down that among the above-mentioned objects against which bombardment is prohibited are not included ' military works, military or naval establishments, depôts of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour '.

" (6) With regard to air warfare, the ' Draft Rules of Air Warfare [of 1923] '[1] provide in Article 24 as follows:

> ' (1) Aerial bombardment is legitimate only when directed at a military objective—that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.
>
> ' (2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.
>
> ' (3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.
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> ' (4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.
>
> ' (5) . . .'

It is also provided, in Article 22, that ' aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited '. Thus the Draft Rules of Air Warfare prohibit targetless aerial bombardment; establish the principle of military objectives; and, on the basis of the distinction between areas in the immediate vicinity of the operations of land forces and other areas, provide that indiscriminate aerial bombardment against the former is permitted while against the latter the aerial bombardment of military objectives only, is permitted. These provisions might appear too strict in expression in comparison with those concerning bombardment by land and naval forces, but what is meant by them is thought to be the same as the distinction between the defended city (area) and the undefended city (area). Although the Draft Rules of Air Warfare cannot be described as part of positive law as they have not yet come into effect as a treaty, students of international law regard them as authoritative on the law of air warfare. Some States adopt the substance of the Rules as a code for the activities of their armed forces, and their essential provisions were formulated in line with the rules of international law and practice then in force. It can therefore be said that the prohibition of indiscriminate aerial bombardment of an undefended city and the principle of military objectives contained therein are rules of customary international law in view of the fact that these are also found in common in the rules of land and sea warfare. Further, whereas the distinction between land, sea, and air warfare is based on the place of hostilities and their purpose, there would seem to be ample ground for the view that the laws and regulations respecting land warfare may apply by analogy to the aerial bombardment of a city, since in effect the latter is no more than bombardment on land.

" (7) What, then, is the distinction between a defended city and an undefended city? In principle, a defended city is a city which resists an attempt at occupation by land forces. A city even with defence installations and armed forces cannot be said to be a defended city if it is far away from the battlefield and is not in immediate danger of occupation by the enemy. Since there is no military necessity for indiscriminate bombardment, only bombing of military objectives there is permissible. However, indiscriminate bombardment is permissible on grounds of military necessity against a city which resists an attempt at occupation by the enemy, since in that case an attack based on the distinction between military objectives and non-military objectives is of little military effect and cannot achieve the intended purpose. Thus it can be concluded that it is a generally recognized principle of international law respecting air warfare that indiscriminate aerial bombardment going beyond the aerial bombardment of military objectives is not permissible in regard to an undefended city.

" Of course it is possible that the aerial bombardment of a military objective will result also in the destruction of non-military

[1 For text see United Kingdom, *Parliamentary Papers*, Cmd. 2201 (1924), or *A.J.*, 17 (1923), Suppl., p. 245. In *A.J.*, 32 (1938), Suppl., p. 12, the text of the Draft Rules is given with commentary by the Commission of Jurists.]

objectives or in casualties to non-combatants; this is not unlawful as long as it is an inevitable result incidental to the aerial bombardment of a military objective. Nevertheless, it remains true that aerial bombardment directed at a non-military objective or without distinction between military objectives and non-military objectives (the so-called ' blind aerial bombardment of an undefended city ') is not permissible in the light of the principle enunciated above.

" As already stated, the power of destruction and damage of the atomic bomb is tremendous, and even such a small-scale bomb as the one dropped on Hiroshima and Nagasaki discharges energy equivalent to 20,000 tons of conventional bombs. It is clear that the explosion of an atomic bomb of such power of destruction will bring about the almost complete destruction of a medium-sized city, to say nothing of the distinction between military objectives and non-military objectives. Thus, the aerial bombardment with an atomic bomb of an undefended city, if not of a defended city, should be regarded as tantamount to a blind aerial bombardment and as such contrary to international law of the time.

" (8) It is beyond dispute that Hiroshima and Nagasaki were not cities which were resisting an attempt at occupation by land forces at that time. It is also clear from what has been stated that neither of these cities fell within the definition of a defended city, since they were not in immediate danger of occupation by the enemy, even though both were defended with anti-aircraft and other guns against air raids, and had military installations. Further, it was well known that some 330,000 civilians in Hiroshima and some 270,000 civilians in Nagasaki had their homes there, even though both cities also had what may be called military objectives, such as armed forces, military installations and munitions factories. In these circumstances, it is proper to conclude that the aerial bombardment with an atomic bomb of both Hiroshima and Nagasaki was an illegal act of hostilities under international law as it existed at that time, as an indiscriminate bombardment of undefended cities. This is so since aerial bombardment with an atomic bomb, even if its target is confined to military objectives, brings about the same result as a blind aerial bombardment because of the tremendous destructive power of the bomb.

" (9) Against this conclusion is advanced the argument that war in those days had the character of so-called ' total war ', in which it was difficult to distinguish between combatants and non-combatants or between military objectives and non-military objectives, and that the principle of military objectives was not always maintained during the Second World War.

" It is difficult to deny that the concept of a military objective, though prescribed by various expressions in these treaties, is not necessarily static in content but may change with time, and its scope tends to be enlarged under conditions of total war. Nevertheless, the distinction between a military objective and a non-military objective

cannot be said to have completely disappeared. For example, schools, churches, temples, shrines, hospitals and private houses cannot be classed as military objectives, even under conditions of total war. If the concept of total war were to be taken to imply that everyone who is a national of a belligerent State is a combatant, and that all means of production are means of injuring the enemy, there would arise the necessity to destroy the whole population and all the property of the enemy, and it would be meaningless to distinguish between a military objective and a non-military objective. However, this concept of total war has been propounded in recent times simply to point to the fact that the outcome of a war is not decided only by armed forces and weapons, but that other factors—mainly economic factors—such as energy, resources, productive capacity of industry, food stuffs, and trade, and human factors including the general population and the labour force, also have a far-reaching effect on the method and the potential of war. Thus the concept of total war has not been propounded as consisting of a mere failure to distinguish between combatants and non-combatants, etc., as has been argued; nor, indeed, has there been any case of that kind. Accordingly, it is wrong to claim that the distinction between a military objective and a non-military objective has disappeared under the situation of a total war.

" (10) During the Second World War, it was sometimes found impossible to identify each individual military objective for attack in a place where munitions factories and military installations were concentrated in a comparatively small area, and where defence installations against air raids were very strong. In such a case aerial bombardment of the whole area took place, and some hold the view that this practice may be regarded as lawful. Such aerial bombardment, called target-area bombardment, may be regarded as lawful even if it goes beyond the principle of military objectives, since the destruction of non-military objectives is small in proportion to the large military interests or necessity involved. However, the doctrine of target-area bombardment cannot apply to the cases of Hiroshima and Nagasaki, since both cities clearly could not be said to be areas where such military objectives were concentrated.

" (11) Again, the atomic bombing of both Hiroshima and Nagasaki is believed to be contrary to the principle of international law prohibiting means of injuring the enemy which cause unnecessary suffering or are inhuman. It goes without saying, however, that it is not permissible to extend this argument so as to prove that the atomic bomb must necessarily be prohibited because it has characteristics different from other conventional weapons in the inhumanity of its effects.

" For the international law of war is not formulated simply on the basis of humanitarian feelings. It has as its basis both considerations

of military necessity and effectiveness and humanitarian considerations, and is formulated on a balance of these two factors. To illustrate this, an example often cited in the textbooks may be given, of the provisions of the St. Petersburg Declaration of 1868 prohibiting the use of projectiles under 400 grammes which are either explosive or charged with combustible or inflammable substances. The reason for the prohibition is explained as follows: such projectiles are small and just powerful enough to kill or wound only one man, and as an ordinary bullet will do for this purpose, there is no overriding need for using these inhuman weapons. On the other hand, the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect.

" When looked at from this angle, the question is whether the act of atomic bombing falls under ' the employment of poison or poisonous weapons ' prohibited by Article XXIII (*a*) of the Hague Regulations respecting war on land, or under the prohibitions provided for in the Declaration of 1899 prohibiting the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases, or the Protocol of 1925 prohibiting the use in war of asphyxiating, poisonous and other gases and bacteriological methods of warfare. With regard to this point, there is as yet no agreement among international lawyers on the difference between poisons, poisonous gases, bacteria, etc., on the one hand, and atomic bombs, on the other. However, in view of the fact that the St. Petersburg Declaration provides that '. . . considering that the use of a weapon which increases uselessly the pain of people who are already placed out of battle and causes their death necessarily is beyond the scope of this purpose, and considering that the use of such a weapon is thus contrary to humanity . . .' and that Article XXIII (*e*) of the Hague Regulations respecting war on land prohibits the employment of such ' arms, projectiles, and material as cause unnecessary injury ', it can safely be concluded that besides poisons, poisonous gases and bacteria, the use of means of injuring the enemy which cause injury at least as great as or greater than these prohibited materials is prohibited by international law. It is doubtful whether the atomic bomb with its tremendous destructive power was appropriate from the viewpoint of military effect and was really necessary at that time. It is indeed a fact to be regretted that the atomic bombing of the cities of Hiroshima and Nagasaki took away the lives of tens of thousands of citizens, and that among those who have survived are those whose lives are still imperilled owing to its radioactive effects even now after eighteen years. In this sense it is not too much to say that the sufferings brought about by the atomic bomb are greater than those caused by poisons and poisonous gases; indeed, the act of dropping this bomb may be regarded as contrary to the fundamental principle of the law of war which prohibits the causing of unnecessary suffering.

" II. *Evaluation of the act of bombing according to municipal law.*— If, as has been shown at length above, the act of atomic bombing of Hiroshima and Nagasaki was contrary to international law, the next question is whether it also constituted an unlawful act according to the municipal law of Japan and of the United States of America.

" (1) With regard to Japan, the Imperial Constitution in force at the time when the atomic bombs were dropped contains no express provisions on the relationship between international law and the municipal law of Japan. It was believed, however, that customary international law was part of its municipal law, and that treaties had the force of law in its municipal law by promulgation. Accordingly, there is sufficient ground for the view that inasmuch as the act of atomic bombing is contrary to international law, it also constitutes an unlawful act in the municipal law of Japan.

" (2) With regard to the United States, it is known that treaties are the supreme law of the land in accordance with Article 6, paragraph 2, of the Constitution of the United States, and that customary international law is also part of the law of the land. Such being the case, it would seem to be a fair assumption that an act contrary to international law constitutes an unlawful act in the municipal law of the United States.

" (3) Be that as it may, it is of little use to examine further in the abstract the question whether an act of atomic bombing is contrary to the municipal law of Japan and the United States, since the question whether an act violates municipal law, on the one hand, and the question whether the responsibility for the violation can be placed on some person or the question as to what court may be seised for the purpose of pursuing the responsibility, on the other hand, are two different categories of questions which must be treated separately. A concrete question is solved only when these latter questions are considered. This point will be touched upon below, where the question of responsibility for acts contrary to international law is dealt with.

" III. *Claims of individuals for damages.*—(1) It is an established principle of international law that a belligerent who causes damage to the other belligerent by acts of hostilities contrary to international law is under an obligation to make compensation to the latter for the damage.

" Since it is not disputed that the act of atomic bombing on Hiroshima and Nagasaki was a regular act of hostilities performed by an aircraft of the United States Army Air Force, and that Japan suffered damage from this bombing, it goes without saying that Japan has a claim for damages against the United States in international law. In such a case, however, responsibility cannot be imputed to the person who gave the order for the act, as an individual. Thus in international law damages cannot be claimed against President Truman of the United States of America who ordered the atomic

bombing, as it is a principle of international law that the State must be held directly responsible for an act of a person done in his capacity as a State organ, and that that person is not held responsible as an individual.

" (2) May the individual who suffered injury by an act contrary to international law then have a claim for damages in international law against the State which caused the injury?

" When discussing this point, the first question to consider is whether an individual can be a subject of rights in international law. The traditional view limits the subjects of rights in international law to States, on the ground either that international law is a law for regulating the relations of States, or that international law is established on the basis of agreement among States. However, even if international law has hitherto been concerned chiefly with regulating the relations between States, it does not follow that therefore an individual cannot become a subject of rights in international law; and the status of a subject for creating norms of international law has nothing to do with the status of a subject of rights in international law. The view is also put forward that an individual may not be a subject of rights because international law does not always possess the force of law within a State. This view is not acceptable, since it is possible in theory that international law may accord to the individual the status of a subject, even when it does not have the force of law within a State. Thus, an examination of the fundamental character of international law does not lead us to the conclusion that by its very nature only a State can be the subject of rights in international law.

" (3) Can, on the contrary, an individual always be a subject of rights in international law? The question of an individual being a subject of international law arises when international law (mainly treaties) prescribes rights and duties for an individual. In such a case, there are found two conflicting views in the doctrine of international law: the view that an individual acquires *ipso facto* rights and duties in international law if international law prescribes rights and duties for the individual, and the view that an individual cannot be said to acquire rights and duties in international law unless there is a means through which the individual can assert these rights or be bound by these duties in his name on the plane of international law. This conflict arises from a difference of views on the subject of international law and, indeed, of law in general. The Court is of the view that, speaking in the abstract, for a person to be a subject of rights or of law implies that he must be able to assert his rights and to be bound by duties in his own name. Accordingly, in order for a person to be a subject of rights in international law, he must be able to assert his rights and be bound by his duties in his own name. That being so, the Court regards the latter view as the correct one.

" An examination from this angle of treaties which recognized individuals as subjects of international law in this sense will reveal the following: as examples in which an individual was entitled to appear as a party before an international tribunal can be cited the treaty for the establishment of an international Prize Court adopted at the Hague Peace Conference of 1907, the treaty for the establishment of the Central American Court of Justice concluded by five Central American countries in 1907, and the economic clauses of the Versailles Treaty and other peace treaties concluded at the end of the First World War (Treaty of St. Germain-en-Laye, Treaty of Trianon, Treaty of Lausanne and Treaty of Neuilly-sur-Seine). The treaty for the establishment of an International Prize Court is a special case in that it was not ratified, and so did not become part of positive international law, and that it was concerned with a court of appeal from the decrees of national prize courts. Again, the treaty for the establishment of the Central American Court of Justice was in force for only ten years among five Central American countries. For these reasons, these two treaties are not suitable for the consideration of the general question here at issue.

" On the other hand, the Versailles Treaty and other peace treaties provided for the establishment of mixed arbitral tribunals to deal with cases concerning property rights of nationals of the countries involved in the First World War. In the case of the Versailles Treaty, nationals of the Allied and Associated Powers were given the right to bring cases directly against the German Government, before mixed arbitral tribunals, for compensation for the damage suffered in respect of their property, rights, and interests within German territory as a result of the application of wartime emergency measures or of transfer measures of the German Government. Moreover, they could bring cases before mixed arbitral tribunals in their own names, quite independently of the will of their home Governments. In this case, therefore, individuals can be said to be subjects of rights in international law. The view has been expressed on the strength of this example that individuals have come to be recognized in general as subjects of rights in international law. This view, however, cannot be accepted, because in this case the object of compensation was limited to the damage to property, rights, or interests within German territory resulting from the application of wartime emergency measures or transfer measures of the German Government and did not extend to all the damage caused by the conduct of the war by Germany, and also because the right to claim damages was open only to nationals of the Allied and Associated Powers, and not to nationals of the defeated States. Further, the mixed arbitral tribunals were *ad hoc* tribunals established separately by each of the victorious Powers and Germany. The most important point is the fact that

they were all based on concrete provisions of the treaties concerned. The case therefore is not a sufficient ground for the view that individuals have come to be recognized in general as subjects of rights in international law, and a procedure for asserting such rights on the level of international law has been guaranteed. The Court deems it proper to conclude that individuals become subjects of rights in international law only in so far as they are recognized as such in concrete cases by treaties, as seen in the example of mixed arbitral tribunals.

" (4) The plaintiffs argue that an individual has a claim in international law, since the right of the individual can be exercised by his home Government. However, if what is meant by this argument is that the State exercises the right of an individual on the level of international law in his name, as his agent on his behalf, there is no such rule in international law nor is there any ground in international law to justify this argument.

" It is true that a State is entitled in international law to demand from another State reparations for the damage caused to its nationals in the name of the State on behalf of its nationals. This is what is widely known as diplomatic protection. Diplomatic protection is an act flowing from the right of the State itself to give protection to its own nationals, and the claim for damages is asserted not as the claim of an individual but as that of the State itself. And the State exercises the right of diplomatic protection in its own judgment and in its own name, not in its capacity as agent of its national. Borchard and others call this phenomenon ' immersion of the individual's claim into the State's claim '. In this case, the State is completely free from interference of its nationals as to how and what it claims, or how it settles the claim. The State need not claim compensation for all the damage caused to its nationals, and it freely decides as it pleases the manner in which it distributes any compensation obtained. Therefore there is no room in such a case for regarding the individual as a subject of rights in international law.

" (5) It has now become clear from what has been said above that there is in general no way open to an individual who suffers injuries from an act of hostilities contrary to international law to claim damages on the level of international law, except for the cases mentioned above. Accordingly, the question left to the individual is whether he can ask for redress before a municipal court of one or both of the belligerent States. However, redress before a Japanese court is impossible, because the position of an individual who brings an action before a Japanese court against the State in question as defendant, in this case the United States, is subjected to an established principle of international law that a sovereign State is not subject to the jurisdiction of the civil courts of other States, a principle which is recognized in Japan (Court of Cassation, Case No.

(ku) 218 of 1928, Decision of December 28, 1928; 7 *Collection of Judicial Precedents Concerning Civil Affairs* 1128[1]).

" (6) Is redress possible, on the other hand, before the courts of the United States?

" With regard to this point, questions of both procedural and substantive law arise, such as whether the courts of the United States have jurisdiction, or whether the plaintiffs as foreigners have the *locus standi* to bring an action. In short, however, the conclusion in substantive law is that the plaintiffs cannot make the United States or President Truman liable for the responsibility for an act which is unlawful according to the law of the United States.

" In the law of the United States, the doctrine of sovereign immunity has consistently been applied since the nineteenth century. It is the principle that the State does not incur liability for damages for unlawful acts of its officials committed in the performance of their duties, similar in effect to the principle in England that ' the King can do no wrong '. This doctrine of sovereign immunity is variously explained in case-law and legal theories: that it is based on political considerations imposed out of necessity, that it is unthinkable *for all the subjects to commit an unlawful act* (*sic*), or that what the State does must be lawful. The doctrine of sovereign immunity is applied not only to the State but also to the highest executive organs of the State, including the President, and it is held that these organs do not incur liability as individuals for their unlawful acts committed in the performance of their duties. It is true that, as the plaintiffs contend, the English doctrine that ' the King can do no wrong ' has not been adopted as such by the United States, and how the doctrine of sovereign immunity, quite similar to the English doctrine, has come to be applied in the United States is not well known. Nevertheless, there is no denying the fact that the doctrine of sovereign immunity is generally applied in the United States. Great as the atomic bomb may be in its destructive power, as alleged by the plaintiffs, one cannot believe that it has succeeded in destroying this doctrine.

" Since the Second World War, the United States has enacted the Federal Tort Claims Act, and has come to accept the liability of the State for damage arising from its unlawful acts. The Act, however, contains many exceptions, for example, that the State is not liable when an executive organ of the State has performed a discretionary function, that it is not liable for acts of hostilities by the Army or the Navy, and that claims which arise in foreign countries are excluded. These exceptions in themselves will exclude the possibility of a claim for damages against the United States or President Truman for an unlawful act in the law of the United States. It is self-evident that this conclusion is not affected according to whether

[1 *Annual Digest*, 4 (1927–1928), Case No. 107, p. 168, *sub nom. Matsuyama and Sano* v. *The Republic of China*.]

the case is brought at the time of the atomic bombing or after the enactment of the Federal Tort Claims Act.

" (7) What has been stated above with respect to the case where an individual brings a claim in international law before the municipal courts of Japan or the United States applies with equal force to the case where an individual brings a claim for damages before the courts of Japan or the United States on the ground that the act constitutes a tort under the law of Japan or the United States. There is no need to repeat the conclusion that the individual cannot ask for redress before the courts of Japan or the United States with respect to his claim under municipal law.

" IV. *Waiver of claims in the Peace Treaty with Japan.*—(1) The greater part of the conclusion as to this case may already be clear from what has been stated above. However, all the questions have not yet been studied. It remains to be examined how the rights and duties arising out of the state of war between Japan and the United States are dealt with by the treaties existing between both countries, and especially how the claims of individuals under international law are dealt with in the Treaty.

" (2) Article 19 (*a*) of the Treaty of Peace with Japan, which was signed at San Francisco on September 8, 1951, and came into force on April 28, 1952, provides:

> " Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.'

It would seem clear that the ' claims of Japan ' which were waived by these provisions include all the claims which Japan has on the basis of treaties and customary international law. Accordingly, there is no doubt that claims such as those for compensation for damage caused to Japan by illegal acts of hostilities are included.

" (3) What then does ' claims of [Japanese] nationals ' mean? The defendant contends that inasmuch as Japan and Japanese nationals are different subjects of law, Japan cannot waive the rights of its nationals, and that accordingly what has been waived in these provisions is nothing else but the right of Japan to give diplomatic protection with regard to the rights of individuals.

" But this view cannot be accepted. The right of diplomatic protection, as already stated, is an inherent right of a State. Accordingly, it is to be included in the ' claims of Japan ' for the purposes of Article 19 (*a*). Moreover, while the ' claims of Japanese nationals ', as a general expression, appear to imply substantive rights, the right of diplomatic protection is thought to be no more than a procedural right, even though in many cases the State takes up the rights of its own nationals under the municipal law of the other State through invoking the right of diplomatic protection.

" (4) As for the contention that a State cannot waive the claims of its nationals, who are different subjects of law, the contention would surely be justified if the claims of nationals referred to meant the rights of its nationals under international law. However, it must be pointed out that a State has the power to waive the claims of its nationals under municipal law. A State has, as a function of its sovereignty, the power to create, modify and extinguish rights and duties of its nationals in accordance with the due process of its municipal law; it is therefore possible in theory for a State to undertake, as against another State, to waive the rights of its nationals which have such character in relation to the State, setting aside the question of the propriety of such an undertaking. This is evident also from the provisions of Article 14 (*a*) 2 (1) of the Peace Treaty, in which Japan recognizes that the Allied Powers shall have the right to dispose of property of Japanese nationals within the territory of the Allied Powers (the so-called overseas assets). And it will be easily understood that the object of waiver in this case is the rights of Japanese nationals under the municipal law.

" (5) In the light of this examination, it appears natural to interpret the term ' claims of Japanese nationals ' waived by Article 19 (*a*) as including the claims of Japanese nationals against the Allied Powers and their nationals under the municipal laws of Japan and of the Allied Powers. The opinions of experts submitted to the Court unanimously conclude that the ' claims of Japanese nationals ' refer to the rights of Japanese nationals themselves. Moreover, that the Japanese Government itself regarded them as referring to the rights of Japanese nationals is seen from the statement to the same effect made in the House of Representatives by the then Director of the Treaties Bureau of the Ministry of Foreign Affairs.

" (6) The plaintiffs contend that in ' claims of Japanese nationals ' are included claims of nationals under international law as well. However, as already stated, the claim of an individual under international law comes to be recognized only in so far as it is specifically provided for in a treaty, with the *locus standi* and other procedural guarantees for asserting the claim recognized on the international level. The Peace Treaty with Japan of course does not recognize such procedural guarantees. Again, if, as contended by the plaintiffs, the claims of Japanese nationals under international law were to be included in the Peace Treaty with Japan, one would be forced to the conclusion that the claims of Japanese nationals for damages under international law were recognized constitutively by the provisions of this Treaty only to be waived at the same time by the same Treaty. It is, however, not natural to assume that a special technique of this kind was employed in the Treaty, nor is there any necessity to resort to such a technique. There is no case in history prior to the Peace

Treaty with Japan in which claims of individuals for damages under international law were recognized. In these circumstances, the Peace Treaty with Japan did not recognize the claims of Japanese nationals for damages under international law, nor did it waive such claims. What was waived by Article 19 (*a*) of the Peace Treaty with Japan were claims of Japanese nationals under the municipal laws of Japan and of the Allied Powers.

"V. *The defendant's responsibility for the waiver of claims.*— The plaintiffs allege that they have lost their claims for damages, under both international law and municipal law, against the United States and President Truman through the waiver of these claims by the defendant. It has been shown above that claims under international law, if any, were not the object of the waiver in the provisions in question; and the claims under municipal law which were the object of waiver in these provisions could not arise in the present case, as has already been explained in detail. Such being the case, the plaintiffs had no rights to lose, and therefore there is no reason for regarding the defendant State as legally responsible to the plaintiffs for an unlawful act."

[Report: *Japanese Annual of International Law*, No. 8 (1964), p. 212 (in English).]

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NOTE.—For references to particular articles of treaties, see the Table of Treaties, p. xxxi above.