

# **Chapter 13 Postwar Forced Internment and International Law**

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## **Preface**

### **Treatment of Prisoners of War in Modern Times: Brief Historical Review**

During the tragic Thirty Years War, Grotius, known as the father of international law, tried to place the exercise of power by states under the standard of justice in his famous work, *De jure belli ac pacis (On the Law of War and Peace)*. The War ended with the Peace of Westphalia in 1648 and many sovereign states were born. After the publication of Vattel's "International Law" (1757) and Rousseau's "Du Contrat Social – or Social Contract" (1762), international society experienced *the American Declaration of Independence* (1776) and *the French Revolution* (1789). Through those years and later, the wars, formerly fought between monarchs and feudal lords, transformed themselves into those between the peoples of nation states. The French National Army during the Napoleonic Wars well testifies to such a change.

Modern international law, based on the independence and freedom of such modern states, created new state practices. The French Revolution produced many documents along these lines, including a decree on handling prisoners of war (Décret concernant les prisonniers de guerre) 4 May, 1792. This decree declared the principle that prisoners of war were under special protection. This was the first step in the modernization of international humanitarian laws.

Later came the "Declaration of Paris (Déclaration pour régler divers points de droit maritime – Declaration to conform the essentials of maritime law)" in 1856 and "Instructions

for the Government of Armies of the United States in the Field (Lieber Code)” in 1863, during the American Civil War. Meanwhile in Switzerland, Henri Dunant initiated the movement to establish the International Committee of the Red Cross in Geneva, with the result that the first Red Cross Convention was adopted in 1864.

Regarding the codification of laws of war in general, the proposed provisions of the “Brussels’ Declaration” had in mind the laws and regulations relative to the prisoners of war, but this declaration did not come into force. This proposal, however, was later materialized in the adoption of “the Convention Respecting the Laws and Customs of War” at the First Hague Peace Conference of 1899. Other results included a declaration prohibiting the use of dum-dum bullets (“Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body”) and a declaration that prohibited the use of poisonous gases (“Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases”). The Second Hague Peace Conference of 1907 was successful in a comprehensive compilation of this series of declarations and conventions. Indeed, this was the origin of modern humanitarian laws.

## **Section 1 International Law Concerning Prisoners of War**

There are various arguments about the standard in determining whether internees are combatants (often referred to as POWs) or internees after the end of war (sometimes referred to as SEP), combatants or non-combatants, under the international law concerning prisoners of war. It should be pointed out that there are differences in the treatment of these internees according to the phrasing of conventions and customary international law, and additional explanations will be given where needed.

## **1. “Convention Respecting the Laws and Customs of War on Land” and “Regulations Concerning the Laws and Customs of War on Land” (1907)**

In the First Hague Peace Conference held in May 1899 (the first international peace conference ever held in peacetime, and not for the settlement of a specific war), the “Convention Respecting the Laws and Customs of War on Land” was adopted together with the “Convention for the Pacific Settlement of International Disputes,” “Convention to Apply to the Principles of the Geneva Convention to the Maritime law” and “Poison Gas Prohibition Declaration.” Twenty-six nations including Japan and Russia participated.

The Second Peace Conference was held from June to October, 1907, and continued the work of amending the previous Convention of 1899. The Convention and its Regulations were only slightly amended in 1907, so that the content and articles can be considered almost the same as those of the 1899 version. Matters concerning prisoners of war are stipulated in Chapter 2, Section 1 of the Regulations, which contain 18 articles. The Convention provides in its article 2: “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.” At the same time, this new Convention “shall, as between the Contracting Powers, be substituted for the Convention of 29 July 1889 – The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention (article 4).” Under the circumstances it will be appropriate to ignore the former Convention in dealing with the current problems. In fact, the provisions of both Conventions (1899 and 1907) on prisoners of war can safely be considered basically identical, with only minor differences in some articles and clauses, including a few inserted in view of the experience gained from the Russo-Japanese War. Among the forty-six countries having ratified the 1899 Convention, seventeen countries did not ratify the new Convention. However, in view of the article 4 above and other circumstances, and now that the greater part of the provisions of both Conventions are considered to be the expression of the customary law

of today, the 1907 Convention should be considered to have binding powers for all countries, including Japan and Russia.

Already, in the Preamble to the 1864 Convention, there was what is known as the Martens Clause, proposed by the Russian representative Fyodor Martens, which states “in cases not included in the Regulations adopted by them,....the population and belligerents remain under the protection and the empire of the principles of international law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience,” and continues: “it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.” Something almost similar is mentioned also in the Preamble of the 1907 Convention. In other words, the principles were made clear that the later laws of war should be interpreted and applied along the lines of this provision. Thus the “Martens Clause” which attaches great importance to the principles of international law, customs and rules of humanity in international law, merits special attention in the discussions which follow. It should be noted that both Japan and Russia were parties to the new Convention.

In this Second Peace Conference, besides amendments to the three conventions earlier mentioned, additional ten other conventions including the “Convention relative to the Opening of Hostilities” were adopted. However, no concrete results emerged about arms limitations, and this Conference could not prevent the World War I from happening. In spite of those reservations, the establishment of the Permanent Court of Arbitration and the codification of the laws of war are of great significance in the history of international law.

## **2. “Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929” (1929 Geneva Convention) <sup>(1)</sup>**

Many imperfections and points which are not clear in the former conventions of 1907 were revealed during the First World War. This war, for the first time in history, assumed a character of the total war, never experienced before. A number of imperfections in the regulations on the

treatment of prisoners of war were observed in view of the experience gained through the World War I, which lasted for more than four years. Parts of the regulations were corrected by several conventions concluded between various nations in 1917 and 1918, but this problem was also taken up by the International Law Association in Ports mouth in 1920 immediately after the war ended, and after that by the same Association in The Hague in 1921, at the 10th International Red Cross Conference of the same year, and at the Stockholm Assembly in 1924. Then in July 1929, the Geneva Convention on Prisoners of War of 1929 was adopted in Geneva. Forty-seven countries including Japan originally signed the Convention, although Japan and the USSR did not ratify it. Therefore, this Convention was generally applied throughout the World War II, but it was not applicable, strictly from “legalistic point of view,” between Japan and the USSR (Such relationships including Japan, The USA and the USSR will be discussed later). However, in its Preamble this Convention states: “Recognizing that, in the extreme event of war, it will be the duty of every Power, to mitigate as far as possible, the inevitable rigors there of and to alleviate the conditions of prisoners of war; Being desirous of developing the principles which have inspired the international conventions of the Hague, in particular the Convention concerning the Laws and Customs of War and the Regulations thereunto annexed....” “This is the philosophy underlining the 1929 Convention. It is clearly understood that this Convention contains the same spirit as expressed by the “Martens Clause.” In this respect, this Convention contains many matters applicable not only during the World War II but also at present. The following is the main content of this Convention.

It is clearly provided that prisoners of war are “in the power of the hostile Power, but not of the individuals or corps who have captured them.” In other words, the status of prisoners of war is not dependent on the arbitrariness of the said individuals or the corps, but is what should be dealt with as the responsibility of a nation, such being confirmed as the principles of modern law. The Convention clearly establishes the fundamental principles of the protection of rights, the respect for the honour and the prohibition of retaliatory measures, etc. —PART I. Then, it continues: evacuation of prisoners of war from the zone of combat to be out of danger, prisoners-of-war camps, rations and clothing, management of sanitation in such detention camps,

respect for intellectual and moral needs (including freedom of worship), internal discipline of camps, special provisions regarding officers and persons of equivalent status, payment to prisoners of war, their transfer, their labour, the organization thereof, prohibited labour, wages, communication between prisoners of war and the outside, relationship between prisoners of war and the authorities, prisoners' complaints on the conditions of captivity, penalties applicable to them, including disciplinary punishments and judicial suits —PART III; termination of captivity, including direct repatriation and hospitalization in a neutral country, liberation and repatriation at the end of hostilities —PART IV; measures to be taken at the death of prisoners of war —PART V; relief, collection and transmission of information about prisoners —PART VI; application of this Convention to certain classes of civilians, including correspondents and reporters —PART VII; and the last but not the least provisions are: the obligation to respect the Convention, i.e. the parties to the Convention must respect it under all circumstances. Even in case one of the belligerents is not a contracting party, the provisions are binding as between the contracting parties (article 82), respect for the philanthropic activities of the International Committee of the Red Cross and the supervisory organization that ensures the application of the Convention —PART VIII.

### **3. The Geneva Conventions of 1949**

(1) The treatment of former Japanese soldiers and civilians interned by the USSR after the war is explained in the following paragraphs. The positive laws applicable to the World War II are simply those already mentioned. However, the following series of Geneva Conventions (1949) were binding both Japan and the USSR. These conventions contain many customary laws, and have remained the basic code related to prisoners of war up until the present. Therefore, these conventions should also be studied.

The World War II became a large-scale total war between nations, far exceeding the scale of the World War I, in which many civilian non-combatants were involved. Many cases of violation of international law on prisoners of war were reported, although in view of the

unprecedented scale of the war it is not difficult to understand that some of these were unavoidable. But at the same time, problems did exist in the application of the 1929 Geneva Convention.

For instance, according to Rousseau<sup>(2)</sup>, the 29 countries bound by the 1929 Geneva Convention did not include the USSR, China and Japan. The result is, he claims, that of the internees held by the USSR, 1,321,000 out of 3,730,000 Germans, 63,000 out of 75,000 Italians and 150,000 out of 615,000 Japanese died. This point will be studied in the next section.

In addition, the treatments of personnel engaged in resistance movements in occupied areas and of the soldiers after the surrender of Japan and Germany were not clearly defined, so the necessity for new legislation on those people was recognized. In this respect, members of the International Committee of the Red Cross were carrying out studies, even during the war, with a view to amending the then existing Conventions. That is, the Committee studied the provisions to be expanded, clarified or amended, etc.<sup>(3)</sup>. The Committee worked to prepare draft of Conventions with the aid of the governments and other experts.

After preliminary talks with the Red Cross in each country in 1946, intergovernmental experts' talks in 1947 and the 17th Red Cross International Conference of 1948 in Stockholm, the following four conventions were adopted at the diplomatic conference held in Geneva from 21 April to 12 August 12, 1949. Fifty-nine countries were represented, but Japan sent observers instead of diplomatic representatives, because Japan was under occupation at that time.

- (a) CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (First Convention)
- (b) CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Second Convention)
- (c) CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Third Convention)
- (d) CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

(Fourth Convention)

These were not merely revised versions of former conventions. For instance, new provisions related to “civilians,” “de facto war” and “resistance” were newly incorporated into these conventions.

(2) Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949”

(Third Convention)

It is noteworthy that a common provision (Article 3) was inserted in all these four conventions, whereby the minimum conditions to be applied by countries involved in “armed conflict of not an international character” (the so-called civil wars) were stipulated. In addition, this 3rd Convention replaces the 1929 Geneva Convention in relation between the contracting parties to the new Convention (Article 134). In other words, the 1929 Convention and this Convention coexist, and the provisions in Article 134 do not have the effect of abolishing the 1929 Convention. In fact, the 1949 Convention contains all of the substance of the 1929 Convention, and there are no inconsistencies between these two. As long as the new convention is no more than the revised former convention with additional complementary provisions, it is obvious that parties to the new convention and those to the former convention are bound by the provisions in common of both conventions <sup>(4)</sup>.

Further, in the relations between the countries bound by the Convention of 1899 and 1907, and which are also parties to the new Convention of 1949, the new Convention is complementary to Chapter II on the prisoners of war of the “Regulations Respecting the Laws and Customs of War on Land,” annexed to the 1907 Convention (Article 135).

(3) The adoption of the Geneva Conventions in 1949 was considered to mark the first big step in a new direction from “international law of war” toward “international humanitarian law.” The speed of progress experienced during that period far exceeded what was estimated in 1949. The various Geneva Conventions were considered insufficient for the characteristics and distinctive features of new armed conflicts, and a movement aiming at new international consensus bore fruit as “Additional Protocols” of 1977.

In any case, in the actual application of international humanitarian law including the problems of prisoners of war, we must be aware of the problems of international customs that have become customary law and other legal beliefs, besides positive laws and regulations represented by various mutually related conventions and other documents.

## **Section 2 International Law of War and Humanitarian Law during the World War II (General Remarks)**

In this Section, the main subject will be international law of war during the World War II. In particular, the legal commitments by which Japan and the other countries concerned are bound will be discussed, since general remarks on international law of war have already been made in previous sections.

Prior to going deeper into this subject, it must be pointed out that there is an article which brought about many problems. Article 2 of the Convention of 1907 declares: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." This is the so-called *clausula si omnes* or the general participation clause. Non-parties to the Convention of 1907 also participated in the World War II. Therefore, if we were to interpret this provision strictly in terms of words, as Charles Rousseau did, this Convention could not be applicable at all during the World War II. Putting strict logic aside, however, this Convention was more or less respected as embodying the rules of customary international law, and from the theoretical point of view, if the World War II is seen not as a single war, but as a combination of multiple wars, this Convention can be approached in practice, so excessive emphasis on the general participation clause cannot be correct. In 1907, when this Convention was adopted, such wars as the two world wars in which so many countries took part were not even imagined. On the contrary, most major countries

participated in these great wars, and therefore if this provision had been strictly adhered to, the Convention would have remained little more than a mere name.

## **1. Treaty Relations of Japan with the United States and the United Kingdom (Australia included)**

### **(1) Conventions of 1907 and 1929**

Japan, the United States and the United Kingdom (Australia) are all parties to *the Hague Convention of 1907* (“Convention respecting the Laws and Customs of War on Land” and its annex “Regulations concerning the Laws and Customs of War on Land.”) Therefore, all those countries are bound by this Convention.

As regards *the 1929 Geneva Convention*, both the United States and the United Kingdom and Australia are parties to it, while Japan did not ratify the Convention. It follows therefore that there was not binding commitment between Japan and the US, the UK and Australia.

However, immediately after the war began, the Allied Powers proposed that they apply the 1929 Convention to prisoners of war and apply “mutatis mutandis” to other internees on the basis of reciprocity, and asked Japan to take the same measures. Japan accordingly agreed at the end of January 1942 to apply “mutatis mutandis” the provisions of the 1929 Geneva Convention to prisoners of war and also to retained non-combatants on the basis of reciprocity. It was natural and at the same time reasonable that the Allied Powers took this to mean that Japan declared to abide by the spirit of the 1929 Convention to the extent that she would be legally responsible for her conducts. (In fact, this Convention was quoted in war crimes courts after the World War II.) As mentioned in the preceding section, the 1929 Convention contains many elements of customary law, and such was the world tendency at that time that Japan was obliged to respect this Convention even though, strictly speaking, Japan was not bound by the letters of the Convention. The reason why Japan accepted such offers is considered to be that Germany

and Italy were full members of the Convention and that refusal might be inappropriate for ensuring the humane treatment of Japanese nationals in enemy countries.

## **(2) Third Geneva Convention**

This Convention itself was to come into force six months after two or more instruments of ratification were deposited (Article 138). The United States deposited its instrument of ratification on 2 August, 1955, the United Kingdom on 23 September, 1957 and Australia on 14 October, 1958 respectively.

From the date of coming into force of the Convention, Article 138 continues, it is open to any country who did not sign it. And for those countries acceding to the Convention it would be effective six months after receipt of the notice of accession.

Japan, having not signed the Convention, notified its accession on 21 April, 1953 (The Convention itself had come into effect on 1 October, 1950). Therefore, Japan entered in treaty relationships with the United States in February, 1956, United Kingdom in March, 1958 and Australia in April 1959. The Treaty of Peace with Japan had already come into force, and all internees except war criminals had been sent home. Therefore there was no room for this Convention of 1949 to be applied in relation with these three countries<sup>(5)</sup>.

## **2. Relationship with the Soviet Union**

### **(1) Complexity of Treaty Relationship with the Soviet Union**

The relationship with the Soviet Union or the USSR is complicated. Japan and Czarist Russia were both contracting parties to the Hague Conventions of 1899 and 1907 respectively. But the USSR refused to acknowledge succession of many conventions to which Czarist Russia was a party. When Japan established diplomatic relations with new revolutionary government in 1925, the validity of the Treaty of Portsmouth of 1905 was confirmed in the first paragraph of Article

2 of the Treaty on Fundamental Principles governing the Relations between Japan and the USSR. Besides this Treaty, about other treaties or agreements entered into between the two countries before 7 November, 1917, it was agreed that they “should be examined in meetings to be held between the governments of both contracting powers, and revisions or abolitions can be demanded and made according to changed circumstances (Article 2).” In other words, unless they were revised or abolished in accordance with this provision, which were not the case, the above-mentioned treaties and agreements were fully valid between the two at the time of the World War II. In addition, the Hague Convention of 1907 was a multilateral agreement and could not be revised or abolished merely with the consent of the two countries. As long as the USSR did not denounce this Convention in accordance with the Article 8, we should interpret that the USSR was still bound by the Convention.

In addition, Regulations of The Hague Convention of 1907 states in Article 4, “Prisoners of war must be treated humanely.” This is at the same time declaration of the principle in international customary law and can be interpreted as *jus cogens* or peremptory norm. Further, the spirit of “Martens Clause” is inserted in the Preamble of the Convention and this fact supports the argument. It follows therefore that the norm, in this Convention, generally recognized as international customary law, should be respected even in case the USSR was not a contracting party. About the repatriation of prisoners of war, there is only one provision in the Regulations---“After the conclusion of peace, the repatriation of the prisoners of war shall be carried out as quickly as possible (Article 20).”

The problem is more complicated with the 1929 Geneva Convention. Neither Japan nor the USSR is party to the Convention, which the result this Convention cannot be applied to each other. Nevertheless, again, with the spirit of the Martens Clause included in this Convention, the USSR is requested to respect the relevant provisions in this sense. With regard to the repatriation of prisoners of war, “Belligerents are bound to send back to their own country, regardless of rank or number, seriously sick and seriously injured prisoners of war, after having brought them to a condition where they can be transported (Article 68)” and “in any case, repatriation of prisoners shall be effected with the least possible delay after the conclusion of

peace (Article 75).”

## **(2) Problem of the Application of the Third Geneva Convention**

This Convention came into effect with regard to Japan in October, 1953 and with regard to the USSR in November 1954 (The USSR had deposited its instrument of ratification on 10 May, 1954). In other words, it is possible to interpret that the treaty relationship between the two countries was born, at least potentially, on 10 November of 1954. At that time, the diplomatic relations were not restored but Japan had joined many international organizations such as Universal Postal Union and International Telecommunications Union, both organizations having been established by multilateral international agreements. The USSR did not express any reservations about Japan when the USSR ratified this Convention. This fact is a proof enough, even when no diplomatic relations existed until the “Joint Declaration” came into force on 12 December, 1956, that the Third Geneva Convention actually came into effect between Japan and USSR and it should be noticed that the USSR was at least obliged to respect the provisions of the Convention. To support the discussion, it should be noticed that Article 2 of the Convention states: “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 the said Power, if the latter accepts and applies the provisions thereof.” Therefore, we should positively consider that both Japan and the USSR were mutually bound by this Convention. According to Oppenheim, the result of this provision is to emphasize the legislative as distinguished from the purely contractual character of the Convention <sup>(6)</sup>.

The problem now is: which provisions should be applied retroactively after the entry into force of this Convention between the two countries. As a general rule, there is no retroactive application, unless a different intention is indicated in the Convention itself or otherwise established. This has already been recognized by customary law, and the Vienna Convention on the Law of Treaties of 1969 confirms this in Article 28. The same article

continues further: “the provisions of the treaties in general do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” Judging from such a point of view, there is no provisions in the Third Geneva Convention (at the time of its adoption) which allow the retroactive application to the results of the World War II and therefore it is difficult to interpret that the contracting parties had the intention to allow the retroactive application of the Convention by the countries concerned. This point was recognized in the first decision on the Siberian internment civil case in Japan referred to later in this paper.

Apart from the discussions of the retroactivity of the Convention, there is a problem of international customary law. Clearly the coverage of the Third Convention is so extensive and the content of its provisions detailed. However, it is the fundamental principle of the international law that, in addition to the express provisions, international customary law exists. That is, treaties have two parts or functions: (1) the part which recognizes or confirms the existing law and declares such law and (2) the part which creates new law by legislation. The former can be defined as “declarative” and the latter as “legislative.” The Third Geneva Convention provides the obligations for the countries having denounced it to fulfill in Article 142 paragraph 4. The article continues: the denunciation “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” Here, “principles of the law of nations” mean “international customary laws,” binding all the countries of the world regardless of whether or not they are parties to the Convention. Here no discussion of retroactivity could ever arise.

### **(3) International Customary Law** <sup>(7)</sup>

Article 38 of the Statute of the International Court of Justice mentions the rules of law to be applied as follows: (a) international conventions, whether general or particular, establishing

rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; and (c) the general principles of law recognized by civilized nations; and (d) — omitted—. Among those rules, (b) does not mean just “international custom” but carefully phrased as international custom” as evidence of a general practice accepted as law,” and the latter is exactly what is called “international customary law” which plays an important role in our later discussions. The established theory requires two conditions to ascertain the birth and existence of “customary international law.” One is the substantial element called “general practice” and another psychological aspect called “legal conviction” which backs up the former. In other words, international customary law comes into existence when certain legal actions are carried out repeatedly by many countries, as a consistent practice to a certain degree, supported by legal conviction. A “general practice” is an actual practice which has acquired a universal character as the result of accumulation of precedents of specific national practices. To prove such actual practices, there are diplomatic documents, proposals and remarks during treaty deliberations, remarks and statements in national assemblies of various countries, domestic laws and regulations, press releases and judgments and processes of domestic courts. However, as discussed before, actual practice alone is not sufficient. For actual practice to become “customary law,” which is legally binding, national consciousness or awareness is essential for the countries concerned that they take such actions not merely as diplomatic courtesies or convenience but as “legal obligation under international law.”

Now a problem arises whether the Third Convention is something which “confirms” the various relevant provisions of the 1929 Convention and the international customary law having resulted from accumulated state practices at the time before this Convention came into force between Japan and the USSR. The principle that prisoners should be treated humanely had already been established as international customary law and had also been confirmed in the 1907 Hague Convention and Regulations and in the 1929 Geneva Convention as well. Certainly, the 1929 Geneva Convention succeeds to the Chapter 2 of the 1907 Hague Regulations, together with some other complementary provisions, needed from the experience having been gained during the World War. In other words, the Convention of 1929, while confirming the provisions

of Chapter 2 of the 1907 Hague Regulations, includes certain provisions which are defined, not as fundamental provisions but as technically detailed ones.

It was noted there is an article 2 in 1907 Convention, known as *clausula si omnes* or general participation clause. However, this clause was never quoted during the World War I. Many provisions of the Convention were applied even to non-parties thereto. In particular, until 1939 when the World War II began, there was already some legal standard widely recognized as international customary law, which is applicable also to non-party to the 1907 Convention. It is nothing but the suggestion that the said principle had lost its validity. In fact, the Nuremberg Trial in 1946 states in its judgment that that part of 1929 Geneva Convention, after having deleted the general participation clause, which is considered to have become international custom, binds in fact non-party to the Convention, which is in this case the USSR.

International customary law, except where there is a special agreement in a specific treaty or other international agreements not to apply this law, binds international society as a whole. On the other hand, Vienna Convention on the Law of Treaties considered to have confirmed and codified existing international customary law declares in Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm or general international law having the same character." Here it is confirmed there exists *jus cogens* or a peremptory norm of international law from which no derogation is permitted even by any written documents of legal nature. As of March 2002 the Third Geneva Convention had 189 contracting parties, covering almost all countries of the world. In addition, the Convention states: "— No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them (Article 6)," and again: "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be (Article 7)." Thus this Convention puts

restrictions on concluding special agreements that deviate from the provisions of the Convention. Under these circumstances it must be clear that the norm which international community should observe is almost one and the same; in the actual application no much difference exists between *jus cogens* and international customary law. The real problem is rather what has become international customary law. This cannot be debated in general but must be examined on a case-by-case basis. A good example is a case mentioned later in this paper on the demand for compensation for the forced labour in Siberia.

#### **(4) The Rights of Prisoners of War**

In addition to peremptory norm and international customary law, by which all countries are bound, there are many other related laws. Among the provisions and other regulations which define the rights, benefits, status and duties of prisoners, there are some provisions to guarantee prisoners' rights in the conventions and other legal documents. They are in the Third Geneva Convention, for example, the provisions of Articles 6 and 7 as above, Article 17 (questioning of prisoners), Article 21 paragraph 3 (release of prisoners on parole or promise), Article 54 (the right to the working pay and the right to claims for accidents in connection with the work), Article 68 (the right to compensation for any injury or other disabilities arising out of work) and Article 78 (the right of prisoners to complain about the conditions of captivity); all those provisions raise the questions of the right of the individual prisoner under international law. However, the writer of this paper follows Professor Yamamoto's theory which states that the Third Geneva Convention does not establish the rights of individual prisoners under international law but is only confined to determining the rights and obligations between the contracting parties concerned.

### **Section 3 International Law of War during the World War II (Concerning the USSR in Particular)**

The previous section was devoted to a study of international law of war (and humanitarian law), particularly of norms to be applied to the World War II. This section focuses more specifically on the problems of the internment of Japanese military personnel and civilians having resided in Manchuria and other territories under the Japanese rule, such internment having taken place during and after the end of the war and reference is also made to the Third Geneva Convention. Specifically, the following four points will be examined.

- a) Internment of Japanese military personnel and civilians
- b) treatment of those internees by the Soviet authorities
- c) “war criminals”
- d) repatriation and return of the detainees to Japan

#### **1. Internment or Detention of Japanese Military Personnel and Civilians**

(i) Many of the people dealt with in this paper are those having forcibly been interned after the end of the war. There are no doubts about the Japanese soldiers taken prisoners during the war, to whom the relevant provisions of international law was applicable. However, with regard to the Surrendered Enemy Personnel or SEPs, the decision in the “compensation for damages case” states that it is difficult to say that the plaintiffs who were interned by the USSR after the surrender of the army and disarmament of Japan were the equivalent in concept to prisoners of war. However, the same decision quotes at the same time the declaration by the US government in March, 1947, to the effect that surrendered enemy personnel should also be regarded as prisoners of war to have the right to the treatments set out in the 1929 Convention. The International Committee of the Red Cross also expressed its opinion that surrendered enemy personnel should receive “treatment as prisoners of war.” More over, in consideration of the

spirit of the “Martens Clause” which has widely been accepted since before 1907, it is only natural to think of the recognition by international customary law that they are entitled to treatments in the spirit of humanitarian law even if unforeseen circumstances should arise<sup>(8)</sup>.

There is a general consensus that moving prisoners of war from their place of capture to another place or destination is legitimate in view of Articles 7 and 9 of the 1929 Geneva Convention and Articles 19 and 21 of the 1949 Third Geneva Convention. At the same time, internment of military personnel after the cessation of hostilities is not desirable in view of Article 20 of the Regulations, annex to the 1907 Hague Convention and Article 75 of the 1929 Geneva Convention. The return and repatriation of personnel will be discussed later in connection with the Japanese internees in the USSR.

Civilian internees are covered under a separate convention other than the Third Geneva Convention. The Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 20, 1949 (Fourth Geneva Convention) provides for the protection of civilians during the war time. In the words of the Convention, the “civilians” covered by the Convention are termed “protected persons” (Article 4). The provisions of the Convention are applied “from the outset of any conflict” and “cease on the general close of military operations,” and “in the case of occupied territory, --- one year after the general close of military operations.” However, specific provisions of this Convention are binding “for the duration of the occupation” (article 6). Also, Article 42 prescribes: “the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.” Article 49 also clearly states that “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country are prohibited, regardless of their motive.”

Judging from the above, although this Convention was the first convention adopted after the World War II, the mass forcible transfers of Japanese “civilians” by the USSR to the Soviet territory after the cessation of hostilities cannot but be judged as contravening the principles of humanity and the international customary law symbolized by the spirit of the “Martens Clause.” Such Soviet actions are really comparable to those carried out by the

Germans against the Jews, such actions having already been widely censured. This problem will be taken up again in a later section on the Potsdam Declaration.

(ii) Explanations will be given in Chapter 3 that the British Military Authorities were given excuses to justify their poor treatment of Japanese military personnel interned, known as SEPs. Such treatment on the part of the British resulted from Japanese recognitions that they are not “prisoners of war” as such. The Imperial Headquarters Army Order dated 18 August, 1945 states that the Imperial Army, Navy and paramilitary personnel who will be held in captivity after the Imperial Edict to End the War was issued are not treated as “prisoners of war.” Under the Japanese law, therefore, they are now longer regarded as “prisoners of war,” who during the war were targets of criticism both from moral as well as military point of view in Japan. Taken prisoners of war were simply a shameful conduct for the Japanese soldiers concerned — they would rather have preferred “death.”

On the other hand, according to international law, military personnel and civilians working for the military who come under the control of the enemy are to be treated generally as “prisoners of war,” who deserve the treatment required by international law. In this sense, the Japanese postwar military internees, by whatever name they are called, had the right of access to the appropriate and humanitarian treatment afforded by law, and we can safely define such as “rights as the war prisoner.” It must clearly be borne in mind at this juncture that all those hardships on the part of the internees stem from the violation of the Neutrality Pact (which was in force then) by the Soviet Union in joining the war against Japan and also the violation of Article 9 of the Potsdam Declaration. Japanese Government issued a written Statement to the Parliament pursuant to the cabinet decision on 28 November, 1997, expressing such government views on the status of post-war internees.

Within the USSR on the other hand, “Stalin's POWs”(pages 60-61) by Victor Karpov says in pages 60 & 61 that Japanese army “prisoners” are referred to in the Stalin's Top-Secret Order of 23 August, 1945 – “National Defence Committee Decision No 9898 on the Reception, Placement and Use as Labour Force of Japanese military personnel.” This Top-Secret Order is also mentioned in several documents in references listed at the end of this paper. More recently,

in April 1991, President Gorbachev, in a speech at the Imperial Dinner, expressed his sympathies to the families of the military “prisoners” and on other occasions he referred to Japanese “prisoners”; President Yeltsin also, during his visit to Japan in October 1993, at both the Imperial Dinner and the joint press conference, also referred to Japanese “prisoners,” indicating the recognition on the part of the USSR that they should have treated those internees as “prisoners of war” in accordance with the principles of international humanitarian law.

## **2. The Treatment of the Internees by the USSR authorities**

### **(1) General or Civilian Internees**

A question arises whether non-military internees should receive treatment different from the one which prisoners of war, who are military as well as paramilitary personnel, are to receive. It was already pointed out in “1 Internment of Japanese Military Personnel and Civilians” that there are in the Fourth Geneva Convention some provisions on the benefits to be received by ordinary Japanese or “civilian persons” as referred to in the same Convention. However, here again the problem of retroactivity of law exists in considering the transfer of the Japanese civilians to the Soviet territory and other related matters. In the first place, civilians other than military personnel and civilians working for the military, as long as they do not participate in hostile operations (“Spies” are illegal in accordance with other laws), should not be attacked, wounded or killed, but can be interned in exceptional cases where military operations need such internment. This is at least the principle established under international customary law at the end of the World War II. However, this was the time when the final draft of the future Geneva Conventions including the one on civilians had not been completed.

In this case, what treatment should be given under international law to the civilians interned for operational need? International law requires that military personnel and civilians working for the military, when interned, should be treated as prisoners of war. (Article 3 of the Regulations, annexed to the 1907 Hague Convention, Article 1 of the 1929 Geneva Convention

and Article 4 of the 1949 Third Geneva Convention). Those conventions are designed to guarantee a certain level of treatment by international law to interned military and paramilitary personnel from cruel treatment on the ground that they were part of the military powers. The principle of international law requires that civilians who do not belong to the military, even when interned in exceptional cases, should deserve more lenient treatment than what is experienced by those having belonged to the military. It follows therefore that it is more than natural and logical that by whatever name they are called they should receive at least the same treatment as military personnel and civilians working for the military. At that time, drafting of the Geneva Conventions had not yet been completed, but such arguments were not only supported by many scholars but they conformed to the customary practices of many civilized nations as well.

## **(2) Problems Relating to the Treatment of Internees by the USSR**

(i) The Third Geneva Convention has many detailed provisions on the treatment of prisoners of war which was considered valid at that time. Article 12, considered important among them, provides on the responsibility of the detaining power as follows: "Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them." The USSR made reservations on Article 12, but they concern the third paragraph of the same article and therefore such reservations do not affect the fundamental responsibility of the USSR.

(ii) There were many instances which raised doubts whether the USSR had violated what was recognized as international customary law and various Geneva conventions. The Third Geneva Convention includes fundamental principles, recognized as having become customary law even before the USSR joined the Convention. For example, they are as follows (Before mentioning relative provisions, one thing should be mentioned that it is more than clear that the Third Convention should *ipso facto* be applicable to the internees, having not returned home even after the Third Convention came into force between the two countries) :

(a) “Prisoners must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention...” (Article 13) .

(b) “...all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria” (Article 16) .

(c) “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind” (Article 17).

(d) “Wills” of prisoners of war “shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency” (Article 120). \*The Agency as referred to is the Central Prisoners of War Information Agency to be established in accordance with Article 123 of the Convention.

(e) “Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power” (Article 121).

(iii) The Third Geneva Convention provides in detail other aspects of treatment such as accommodation, food, clothing, sanitation and working conditions. Many of these provisions had already been recognized as customary laws. With regard to the relations of the prisoners with the exterior, Articles 69 to 72 provides on giving information to the party to which prisoners belong about the measures taken by the detaining power as regard the treatment of the prisoners. Every prisoner should be enabled to write direct to his family. He should also be allowed to write to the Central Prisoners of War Information Agency in a neutral country, using a card similar, if possible, to the model annexed to the Convention, informing his relatives of his capture, addresses and state of health. These are more or less the model treatments that should

have been guaranteed to Japanese military personnel and civilians interned in the USSR. As for the reality, many of the facts are illustrated in “the Case Demanding Compensation for Forced Labor in Siberia,” annexed to Section 5 of this Chapter.

### **(3) The Treatment As It Was And Its Legal Implications**

It is only natural for us to assume that the USSR was aware that the internees should be treated in accordance with the international law, given the fact, as mentioned above, that the USSR recognized those internees as military prisoners of war. However, the reality is contrary to our assumptions. The manner in which they were treated is illustrated in Chapter 4, dealing with the history and the reality of the internment.

The treatment by the USSR, described in Chapter 4 and other relevant pages, can only be said to be unjust and contrary to the established international law. To go deeper into the subject, the prisoners of war must be humanely treated (1907 Hague Convention) and this philosophy continues to form the established international norm ever since. There are many provisions to illustrate this fundamental philosophy. They are quoted as follows: --- “No prisoner of war may be employed at labours for which he is physically unfit” (Article 29, 1929 Geneva Convention); “The detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons” (Article 28 of the same Convention). It is further stipulated in the 1929 Convention about the treatment including the guarantee of the maintenance of working hours which are not excessive (Article 30); the use of prisoners for unhealthy or dangerous work is forbidden, and any aggravation of the conditions of labour by disciplinary measures is forbidden (Article 32). Further, there are some provisions in other conventions. “The Government into whose hands prisoners of war have fallen is charged with their maintenance.”(Article 7, Regulations annexed to 1907 Hague Convention); the 1949 Third Geneva Convention also states “Prisoners of war are entitled in all circumstances to respect for their persons and their honour” (Article 14) and “The Power detaining prisoners of war shall be bound to provide free

of charge for their maintenance and for the medical attention required by their state of health” (Article 15). All those points taken together, we can safely conclude such treatment of prisoners of war by the USSR should be considered unlawful.

To summarize, putting aside the strictly legal aspect of the treaty relations between Japan and the USSR (which are extremely complicated as previously referred to), it must be declared that such treatment of the prisoners of war by the Soviet authorities was in violation at least of the established international customary law and other rules and regulations. On the other hand, incidentally, Japanese military post-war internees who suffered under the UK military control did not even enjoy the status of the prisoners of war. However, there were differences in the natural environment and climate (far from extremely cold weather) where even clothing were in some cases not essential, and even in the worst case food was readily available from nature – wild bananas and papayas. It is obvious that from a humanitarian point of view the Soviet authorities should have taken the very difficult natural environment into consideration. Furthermore, unlike the British authorities, having not, from a technical legal point of view, recognized the status of “prisoners of war” of the Japanese internees, the USSR itself did not recognize such a status to the Japanese military personnel internees. It follows therefore that the USSR authorities, as their legal obligations, should have extended far more cordial and benign treatment to the Japanese than the British did. Thus, the USSR should be blamed for not having fulfilled such legal responsibilities.

### **3. The Problem of “War Criminals”**

Many military personnel and civilians were interned for a long length of time and suffered hardships as “war criminals.” Recently, the truth about the trial has been slowly coming to light. Article 10 of the Potsdam Declaration provides: “— stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners—” It is not clear whether the Japanese side had a clear idea of what was referred to as “war criminals.” However, it is all the more reasonable for the Japanese who had a definite idea of the general

principle of law *nullum crimen sine lege* or *nulla poend sine lege* (no crimes or punishment without due process of law) or the principles of legality had assumable a clear idea what the Declaration meant by the expression “war criminals.” The Japanese authorities at that time must have assumed that the war criminals referred to were those who committed the crimes which had been defined as such and illegal at the time when the “alleged crimes” were committed.

The afore-mentioned principles of law together with the principles of the prohibition of *ex post facto* law and of “retroactive application of law” mean in simple terms that where there is no proper and applicable law there is no punishment. Such is the expression of the general principles of law, experienced all through the history—*Magna Carta* (1215), *the Bill of Rights* (1689), *American Declaration of Independence* (1776), *French Declaration of Human Rights* (1789), *the Napoleonic Penal Code* (1810) and other various constitutions and legislations of the 19th century Europe. Modern Japan, since the Meiji Restoration of 1868, was no exception and respected the same principles. However, the International Military Tribunal for the Far East did not follow this principle, and it is a well known fact that the defence counsel, including many Americans, violently objected to the procedure of the trial.

At the time when the Potsdam Declaration was issued, the concept of “war crimes” as recognized by many conventions and other international customary law referred to the acts committed by members of the military forces or civilians of the enemy, who when captured are punishable, and this concept included acts by members of the armed forces in addition to “violations of war regulations, armed hostility by civilians, spying, and wartime treason,” as well as “the slaughter of the general public in or belonging to the occupied territory, transportation of people for purposes such as slave labour, murder or abuse of prisoners or other persons on the high seas, murder of hostages, Looting of public and private property, arbitrary destruction of cities, towns and villages and devastation not militarily justified.” There are many other international agreements in addition to those already mentioned.

However, the charges at the Tokyo Trial actually became very extensive and enormous. In other words, matters went considerably outside the framework of what was at the time commonly thought of as “war crimes.” To put the matter in another way, “crimes against peace”

and “crimes against humanity” were newly introduced, first at the Nuremberg Trial and then at the Tokyo Trial. The counsel for the defence in Tokyo fought, challenged the court that the charges contravened the general principles of law. They insisted that the trial itself was contravening the principles of law, including the problems of jurisdiction, contravention of the law of legality and prohibition of retroactive application of law... Vigorous activities of the American lawyers were especially conspicuous, but not only were most of those defence voices ignored by the court, but 32% of the counter evidences the defence had produced were dismissed by claims from the prosecution and by the free discretion of the presiding judges. (There were 2306 such cases, including those which had not been submitted due to anticipated dismissal.) Thus the Tokyo Trial has become notoriously known as “political” and not “judicial” trial. In other words, it was not “the administration of justice.” The judgments brought criticism from many famous people, including Indian Judge Radhabinod Pal who claimed “Japan was not guilty,” Judges Roeling and Bernard who were both critical of the judgments and American Senator Taft. General MacArthur himself (who proclaimed the court articles and ordinances, supported by the US Army Headquarters and in the name of the Potsdam Declaration; the Tokyo Trial was entirely under his jurisdiction) told President Truman on 5 October, 1950 on the Wake Island that the Tokyo Trial was a mistake, and, more important, on 3 May, 1951 he testified to the effect, at the US Senate Joint Committee on Military and Foreign Relations, that the reason why Japan entered the war was that it was pressured into this mainly due to the necessity of security; in his own words “Their purpose, therefore, in going to war was dictated by security.” However, Article 11 of the Treaty of Peace with Japan was translated as “Japan accepts the Tokyo Trial”— and such a loose translation into Japanese has caused many discussions in Japan. In fact, Article 11 is: “the Japanese government accepts the judgments of the International Military Tribunal” and promised to “carry out the sentences imposed thereby....” This means that Japan agreed to the various Judgements passed.... Japan accepts that Tojo was sentenced to death....and specific conditions regarding pardons, commutations and paroles, but gives no value judgment about the Tokyo Trial itself.

Now, in the USSR at that time the doctrines of the principle of legality and the

prohibition of the retroactive application of law were not adhered to<sup>(9)</sup>. The penal code, as revised by Nazi Germany (1935), and the Soviet Russian Criminal Code of 1926 as well denied such principles. And ever since, the principle of legality was denied under the Soviet Criminal Code. For example, according to Article 6 of the Soviet-Russian Criminal Code of 1926, what is meant by an act socially dangerous is any action or inaction, directed against the Soviet political and social structure and/or violating legal order which was established by worker-peasant authorities during the transitional period toward the Communist structure. Also, Article 16 states in effect that in cases where any socially dangerous act is not directly referred to in the Code, the ground and extent of the responsibility therefore shall be defined in accordance with the provisions determining the most similar type of crimes. The provisions corresponding to this Article 16 were the same as what existed in the form of Article 151 of the Imperial Russian Criminal Code of 1885.

After the World War II, not only in West Germany but also in the USSR, the respect for the principles of legality increasingly got ground. In 1958, the Supreme Soviet Council published the Principles of Criminal Legislation, in which the principles of legality are declared and an analogy or analogical interpretation prohibited (Article 3). The 1960 Russian Republic Constitution stipulated the above principles. The same principles are also confirmed in the Criminal Code. On 10 December, 1948, the General Assembly of the United Nations had already adopted Resolution 217 (III), proclaiming the Universal Declaration of Human Rights. Article 11 (2) states, "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." This Declaration itself is not a legally binding international agreement, but all nations of the world including the USSR are of course expected to fully respect its spirit.

Along with the denial by the USSR of the principle of legality, it is necessary to touch upon its reservations about the Third Geneva Convention. The USSR formulated reservations on Article 10 (protection of the benefits of prisoners), Article 12 (responsibility of detaining

countries) and Article 85 (acts committed prior to capture) in this Convention. Especially with regard to Article 85—“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention,” the USSR declared it did not think obliged to fulfil the duty stipulated in Article 85 to be applied to the prisoners of war having been found guilty of war crimes and crimes against humanity in accordance with the law of the detaining power, following the principles of the Nuremberg Trial, because according to the Soviet reasoning “those who are found guilty should follow the conditions applied to them by the relevant detaining Power in carrying out their punishment.” In other words, the USSR will not permit those who are either indicted or found guilty under domestic Soviet laws to enjoy the benefits stipulated in this article. Because of this reservation, the Soviets must have felt they would not be held responsible for the breach of the Convention even in the event of non-application of the benefits of the Convention to the “war criminals” and those found guilty under Soviet domestic laws and regulations. However, future historians will probably criticize such measures taken by the Soviets, if the Soviet domestic laws and regulations contravened various principles of international humanitarian law.

Articles 85, as referred to above, and 99 (also prohibiting the retroactive application of law) as well in the Third Geneva Convention give the Detaining Power to fix the penalty for the acts, violating the international law (the Potsdam Declaration clause 10) as well as the domestic laws of the Detaining Power itself. However, in the case of USSR, the punishments applied to the former Japanese military personnel transferred to the USSR after being interned was mainly based on the indictments in virtue of the criminal code of the Soviet Union, which says in its Article 2 that it applies to all persons who are arrested within the USSR territories for the crimes committed within the USSR territories and, even if committed outside their territory. The punishments themselves, therefore, may seem legitimate from the Soviet legal point of view. However, it should be pointed out at the same time that there are serious doubts about the propriety of the indictment and the lawfulness of the judiciary procedure and the treatment of criminals. (The Third Geneva Convention contains detailed provisions on court procedure and penal and disciplinary sanctions in Article 82(2) and Articles 83, 84 and 87). As for “war

criminals” who are civilians, their transfer to the Soviet territory itself is difficult to justify from a legal point of view and the lawfulness of the punishment of those brought under Soviet control by such transportation should be negatively considered.

#### **4. Problems Relating to the Return and Repatriation of Internees**

(1) First of all, the 1907 Hague Convention stipulated: “After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible (Article 20 of the Regulations),” and the 1929 Geneva Convention: “Belligerents are bound to send back to their own country, regardless of rank or number, seriously sick or seriously injured prisoners of war, after having brought them to a condition where they can be transported (Article 68)” and further: “In any case, repatriation of prisoners shall be effected with the least possible delay after the conclusion of peace (Article 75).” The 1949 Third Geneva Convention says in Article 118: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” These provisions are expressions of the same spirit; the legal belief having been formed through the history is that the legal obligation arises for the detaining country to ensure that prisoners of war be returned as soon as it becomes possible to do so. Intentionally delaying such repatriation for the purpose of forced labour must be condemned as violating the humanitarian principles. Article 4 of the 1949 Third Geneva Convention is directly applicable to the personnel interned in the USSR after the cessation of hostilities, and in 1950 at the 104th Meeting of the Allied Council for Japan, the desirability of a conclusion of “special agreements,” as referred to in Article 6, was argued, such agreements to guarantee the rights for the internees. In other words, the Allied Council apparently recognized that the terms of the Third Geneva Convention had already acquired the effect of international customary law even before that convention came into force<sup>(10)</sup>.

(2) The Potsdam Declaration undoubtedly binds the USSR. At the same time, clause 9 of the Declaration should be taken as a special law on the repatriation of the Japanese military personnel, as supplementing other various treaties and conventions and international customary

law so far under discussion. With the exception of “war criminals,” the USSR should have sent back Japanese internees in view of the commitments by which the USSR were bound. The USSR's internment of Japanese military personnel for such an extended period constitutes a grave violation of the international law as well as the measures contrary to humanity especially when Japan had already returned to the international society with the San Francisco Peace Treaty coming into force.

The assertion of the USSR at the time was that the internees could be kept until the conclusion of the bilateral peace treaty and since the peace between the two was concluded with the Japan-Soviet Joint Declaration of 1956 and therefore such internees was not a problem until then<sup>(11)</sup>. However, such contention on the part of the Soviets cannot be justified in view of *the Nuremberg Trial* which resorted to the 1929 Convention as the basis of judgments, and also of the Tokyo Trial which almost unilaterally convicted the Japanese side. It is worth noting that the Nuremberg Trials declared that the 1928 Convention had become international customary law since 1939, which could well be the basis of the judgement. Clause 5 of the 1956 Japan-Soviet Joint Declaration states: “On the entry into force of this Joint Declaration, all Japanese citizens convicted in the Union of Soviet Socialist Republics shall be released and repatriated to Japan.” It further continues, “With regard to those Japanese whose fate is unknown, the USSR, at the request of Japan, will continue its efforts to discover what has happened to them.” No direct reference to the repatriation of the internees was made in this declaration. In fact, most of internees in the areas occupied by Allied Powers, except those in the Soviet zone were repatriated during 1946 or in 1947 at the latest, while in the case of the internees in the USSR, repatriation started on 5 December, 1946 with the arrival of SS Unzen-Marū from Sakhalin at Hakodate port; and the first boat from Siberia at Maizuru port on the 8th. Such repatriation was later suspended at the outbreak of the Korean War in 1950 until November 1953 when it was resumed. Repatriation from Soviet territories even after the Japan-Soviet Joint Declaration was very slow and was not fully completed until very late—in fact it was as late as 1958.

## Section 4 The Potsdam Declaration

On 26 July, 1945, the final day of the Potsdam Conference, the three countries at this conference, the United States (President), the United Kingdom (Prime Minister) and the Republic of China (President), issued Proclamation Defining Terms for Japanese Surrender, widely known as the “Potsdam Declaration” or “Potsdam Proclamation,” which was intended to give Japan “an opportunity to end” this war. The Clause 5 of the Declaration lists up various conditions for ending the war and urges Japan to accept them. The Clause 9 in particular clearly states: “The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.” At the same time, Clause 10 states: “—stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners,” and the final clause 13 demands the unconditional surrender of the “Japanese armed forces.” To put it another way, while the Declaration mentions various conditions including the “unconditional surrender of Japanese armed forces” (and not Japan as a country), it guarantees the early return of ordinary military personnel.

At first this was a three-nation declaration by the United States, the United Kingdom and China, but with the entry of the USSR into the war in August the USSR joined this Declaration *vis-à-vis* Japan. About the legal implication of the entry into war will be fully discussed later. Suffice it to say that such entry into the war by the USSR meant simply a violation of the Japan- Soviet Neutrality Pact in force. At the beginning this declaration was merely a unilateral declaration of intentions by these four countries, and did not itself have the binding force under international law. The acceptance by Japan on 14 August and more clearly with the signing of the Instrument of Surrender on 2 September, this unilateral Declaration became an international commitment or agreement legally binding on both parties: Japan on one hand and the allied nations on the other, including the USSR. However, this declaration only indicated the outline of the conditions of surrender, and other details such as territorial issues had to wait until the Treaty of Peace. On behalf of the USSR Kuzma Nikolaevich Derevyanko signed the Instrument of Surrender, along with the representatives of other power.

To repeat, the terms of this Declaration have become legally binding on all parties, including Japan and the USSR. Under the occupation authorities it was often said Japan was a defeated country, having unconditionally surrendered, any kind of treatment therefore had to be accepted without complaint. This discussion may hold if at all as a political theory. However, from legal point of view, it is entirely wrong. Japan itself did not surrender unconditionally. It was only the Japanese forces who proclaimed the unconditional surrender in acceptance of Clause 13 of the Potsdam Declaration. As a defeated country under occupation forces, it may have been difficult for Japan to voice the argument “Allied powers are also bound by the Potsdam Declaration.” For example, we must be reminded of the room for argument whether American occupation forces had the right under international law in giving Japan *de fact* draft of the Constitution. Legally bound or not Japan could not refuse such a directive from the occupation authorities. Here the relevant provisions are mentioned as a reference material: The occupation authorities must “take all necessary measures to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country (Article 43, Regulations annexed to the 1907 Convention).”

The following is a brief observation of the implementation of the terms of surrender. The Japanese side took measures in accordance with the provisions of the Instrument of Surrender commanding the Japanese Government and the General Headquarters “at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.” On the other hand, the Allied powers, including the USSR, were imposed the obligations under international law, to permit the Japanese military forces, after being completely disarmed, to “return to their homes with the opportunity to lead peaceful and productive lives (Clause 9, Potsdam Declaration).” In other words, the Allied nations (including the USSR) were doubly duty-bound, so to speak, to adhere to the various conventions and international customary law on one hand and to the Potsdam Declaration on the other which was in fact a later and special law. It is worthy of special mention that there is a principle called *lex posterior* principle or *lex posterior derogat priori*, which gives later laws higher priority. In fact,

Article 30 of the Vienna Convention of Law of Treaties of 1969 expresses the same idea of the supremacy of the later laws relating the same subject-matter.

With the exception of the case with the USSR, there were certain cases of delay in the repatriation and return of Japanese military personnel and other internees due mainly to a scarcity of the means of transportation and difficulties with infrastructure, and there was also a serious problem of military internees left behind in British-occupied territories in Southeast Asia (Chapter 3). No big difficulties in demobilization with regard to Chang Kai-shek controlled China were reported, and there were no strong voices raised within Japan against the ill-will or negligence by the allied powers in those areas with regard to “demobilization.” At any rate, it should be noted that was because the authorities of the Allied forces dealt with these problems in good faith on the whole, with only a few exceptions.

It is a well-known fact that there were major problems in relation to the USSR. The fact that the forcible transfer of the Japanese military personnel and civilians into the Soviet territories not only after the cessation of hostilities but even after the signing of Instrument of Surrender is, regardless of the reasons, at the least nothing but the violation of the Potsdam Declaration.

## **Section 5 Summary**

In conclusion, the following three points can be highlighted with regard to the illegality of the internment of the Japanese in Siberia by the Soviet Union.

First, the fact that “the Soviet Union violated the Japan-Soviet Neutrality Pact duly effective at the time and initiated war against Japan” was the fundamental cause of the internment. The Pact was supposed to be renewed for another five years unless either Japan or the Soviet Union notified the other to terminate it by 25 April, 1945—one year before its expiry. While the Soviet Union, on 5 April, 1945, notified Japan of its intention to terminate the Pact. Accordingly, Naotake Sato, Japanese Ambassador to the Soviet Union, desirous of keeping

peace with the USSR, had a talk with the Soviet Foreign Minister Molotov, who confirmed that the Soviet Union would be bound by the Pact until the Pact was to be formally terminated, i.e., the 25th of April, 1946. In other words, the Pact was then effective between the two countries. It is perfectly clear to the people who were legally minded that such interpretation is 100 % correct! The Soviet Union must have recognized the position taken by the Foreign Minister Molotov, including the legal implications and must have tried to work out strategy how to explain to future historians the legitimacy of the USSR attitude then taken...It must be recorded that Japan had not attacked the USSR and observed the Pact faithfully despite repeated requests from Germany and also from some opinions in Japan to join Germany in attacking the USSR. These facts are now very well known publicly. The Soviet violation of the Pact is the fundamental cause of the internment issues now under discussion. What is called *Yalta Agreement* was effective only among the USA, the UK, China and the USSR at that time; therefore, even apart from the discussions of justification of the USSR' entry into the war, the territorial issues must as a natural consequence be raised. (The consent of the direct parties involved is essential for the transfer of lands and territories under international law as indicated by the traditional "dictum"—*pacta sunt servanda*—and any territorial issues in *the Yalta Agreement* (SIMPLY Japan not being party thereto) are not applicable to the Japanese case. Furthermore, the U. S. Government denied the effectiveness of the Yalta document, in the U.S. State Department's "US Memorandum on negotiations between Japan and the Soviet Union" dated 7 September, 1956, by saying that "The Document—*the Yalta Agreement*—merely described the common goals of the leaders of the nations involved at that time, and never had any legal effect on territorial transfers."

Second, not only the Japanese soldiers captured in combat or disarmed after the war but also civilians were interned for a long period time at concentration camps in approximately 2,000 sites in Siberia and Central Asia. They were coerced to work as labour in areas such as forest tree cutting, farming, construction of railroads, housing, dams, power plants and canals; and were treated cruelly and inhumanely, an example of which was the "quota system." The International Law of the time stipulated that personnel should be returned, without delay, to

their home countries after the battles ended. It is obvious that the Soviet Union violated Clause 9 of the Potsdam Declaration, legally binding the Soviet Union. From this point of view, it must be an obligation on the part of the international community to enact a law to establish the illegality of such post-war internment as was experienced by the Japanese people.

Third, the Soviet authorities forced the Japanese internees to work in severe cold winter conditions, unless the temperature fell below *minus* 40 or 50 degrees. As many as 60,000 internees died due to malnutrition caused by the lean meals that were provided or due to accidents caused by unfavourable working conditions. Numerous other internees, who survived, suffered from the after effects. While in the concentration camps, they received training such as espionage education and “brainstorming” to become Soviet agents after returning to Japan. Many such actions are considered illegal under International Law. It is true that the treaties signed between Japan and the Soviet Union are so complicated and a large number of issues should be solved through discussions based on the International Customary Law; however, apart from the legal interpretation, the living Conditions and the treatment of the Japanese internees by the Soviet Union should be perceived as “crimes against humanity.”

With regard to this, Russian President Yeltsin, on his visit to Japan in October 1993, expressed an “apology” during the Banquet at the Imperial Palace, at a joint press conference and on other occasions by stating that the treatment of the Japanese internees was an “inhumane act,” an “inhuman act,” an “act committed by totalitarianism,” an “act of Stalinism,” etc.

## **Appendix Demand for Compensation Case—Forced Labour in Siberia<sup>(12)</sup>**

62 plaintiffs, who were interned and put to forced labour in the Soviet Union demanded payment from the Japanese government of the credit balance due to them from the detaining power (in this case, the USSR) as well as the compensation for injuries and other disabilities arising out of work and for the same in respect of the loss of personal effects, monies or

valuables not returned by the Soviet authorities at the time of repatriation. In summary, the plaintiffs' demand was: all those damages which should have been paid by the detaining authorities, in which they failed, and now it was incumbent on Japanese government to make a compensatory payment to them. In this lawsuit, the plaintiffs quoted the provisions of Articles 66 and 68 of the Third Geneva Convention.

The plaintiffs lost the first judgment of the Tokyo District Court (18 April, 1989). Aside from the arguments of Articles 98 (2), 29, 11 and 14 of the Constitution of Japan or the related State Tort Liability Act, the request was made, with regard to international law, pursuant to the provisions of the Third Geneva Convention's Article 66 ("The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power") and 68 ("Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends....Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables...shall like wise be referred to the Power on which he depends"). However, their demand was as a whole dismissed. Beside the judgment on the argument with regard to the Constitution, in which the plaintiffs' demand was not supported either, the position of the court on the provisions of the Convention was as follows: it is difficult to conceive that the provisions of Articles 66 and 68 respectively had become international customary law...the provisions do not confirm the then established customary law during the World War II, but what was newly created; in other words, both provisions are not the result of the "codification" process of the international customary law. It would be fair to add this judgment has invited a number of criticisms<sup>(13)</sup>.

The Tokyo High Court as well as the Supreme Court of Japan confirmed the two preceding judgments on 5 March, 1993 and 3 March, 1997 respectively and this case thus came to a final close.

## Notes

(1) This is the discussion of the Japanese terminology, and the English readers may simply ignore this note.

(2) ROUSSEAU, Charles, *Droit International Public*, Paris ; Recueil Sirey, 1953, pp. 563-564

(3) PICTET, Jean (translated by Enomoto and Adachi) , *Study of the Geneva Convention Volume III*, p. 6

(4) *Ibid.*, p. 688

(5) OHTA, Ichiro (ed.), *History of Japanese Diplomacy, Volume 24*, Kashima Peace Research Institute, 1971, p. 47. See also Chapter 3 (by M. OHTA) on this problem.

(6) OPPENHEIM L. and H. Lauterpacht, *International Law Vol 2, 7th edition*, London: Longmans, p. 371.

(7) Discussions on international customary law in Section 2, 2 (3), owe a great deal to the following materials:

Expert's Legal Appraisal submitted to the court, YAMAMOTO, Soji, *Shiberia Yokuryu Soshu Jiken ni Kansuru Chousa Kenkyu (Research on the Case of Demand for Compensation for Forced Labour in Siberia)*, 1983. FUJITA, Hisakazu, *Kokusai Jindo Hou (Droit International Humanitaire)*, SekaiShisoSha, 1980. HIROSE, Yoshio, *Horyo no Kokusaihou jouno Chii (The Status of Prisoners of War Under International Law)*, Nihon Hyoron Sha, 1990.

(8) HIROSE, *op. cit.*, p. 135

(9) DANDO, Shigemitsu, *Keihou Kouyou Souron (Criminal Law: General Theory)*, Sobunsha, 1995, p.p. 42-45. OHTSUKA, Hitoshi, *Kihou Gaisetsu: Souron (Outline of Criminal Law: General Theory)*, Yuhikaku, 1997, pp. 52-53

(10) HIROSE, *op. cit.*, p. 136

(11) *Shiberia Yokuryu wo Meguru Shomondai Various Problems Related to Siberian Internment*, ISSUE BRIEF 154, Research and Legislative Reference Bureau of National Diet Library, Japan, 1991.

(12) TAIJUDO, Kanae, (ed.), *Senina Kokusai Hou (Seminars on International Law)*, Toshindo, 1994, pp. 183-186. "HANREI TOKUHO (Judicial Precedent News Flash) :Tokyo District Court," in *HANREI-JIHO No. 1329*. "HANREI TOKUHO (Judicial Precedent News Flash): Tokyo High Court," in *HANREI-JIHO No. 1466*. "HANREI TOKUHO (Judicial Precedent News Flash): Supreme Court," in

*HANREI-JIHO No. 1607*. OHASHI, Mitsunori, “Songai Baishu Seikyu Jiken (Demand for Compensation for Damages Case),” *Shomu-Geppou, Volume 36, No 11*. “Shiberia Kyosei Rodou Hosho Seikyu Jiken Daiichi HAnketsu (First Judgment on the case: Demand for Compensation for Forced Labour in Siberia),” in *HANREI TIMES No. 703*.

\* There are many other dissertations. See also the REFERENCES below.

(13) For example, HIROSE, *op. cit.*, pp. 137-148 and also, HIROSE, Yoshio, “Horyo no Kenri ni Kansuru Jindou Kokusai Kanshu Hou no Seiritsu: Shiberia Yokuryu Horyojiken ni Kansuru Isshin Haknketsu no Kentou (The Humanitarian International Law Related to the Rights of Prisoners of War: Examination of The First Decision on the Siberian Internment Case),” in *Meiji Gakuin Ronso*, No. 45, 1989.

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*Junebu Joyaku Kaisetsu III (Study of the Geneva Convention, Volume III)*, International Committee of The Red Cross, translated by Enomoto and Adachi, Asagumo Shinbunsha, 1973, — informally known as “PICTET’s Commentary on the Geneva Convention III; Pictet was the Vice-Chairman of the Red Cross Committee.

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