

AN IMPORTANT TASK FOR THE ICRC

INDEMNIFICATION OF FORMER ALLIED PRISONERS OF WAR IN JAPANESE HANDS

In September 1951, a Peace Treaty between Japan and the Allied Powers that fought against Japan was signed in San Francisco. Article 16 of the Peace Treaty provided for a mandate given to the ICRC to undertake the distribution of funds to those former prisoners of war in Japanese hands who were nationals of the Powers parties to the Treaty, as compensation for the undue hardships those prisoners had suffered during captivity.

The task thus entrusted to the ICRC by a number of governments was considerable. International Review had already informed its readers of the successive tasks accomplished for the distribution of the funds to each of the countries involved. The funds were to be divided in proportion to the total number of the prisoners of war from each country and were to be utilized to provide assistance to former prisoners or to the families of those who had died in captivity or who were suffering from some disability as a result of their imprisonment.

The whole operation, requiring long drawn out negotiations, the tracing of former prisoners and the checking of lists of names, was too complex for it to be implemented in a short time. It was completed some time ago and the ICRC has judged it appropriate to issue a report in French and English, which we are glad to reproduce in International Review in several instalments. It is to be noted that the International Committee of the Red Cross, in helping to carry out, on a strictly humanitarian plane, this novel and very extensive task,

has acted fully in accordance with the traditional principles that have guided its activity as a neutral intermediary and as an independent institution. (Ed.)

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I. INTRODUCTION

Article 16 of the Peace Treaty between Japan and the Allied Powers, signed on 8 September 1951 in San Francisco, provided as follows:

“ As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14 (a) 2 (II) (ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.”

The Peace Treaty was signed by the representatives of Japan and of the following Powers:

Argentina	Ethiopia	New Zealand
Australia	France	Nicaragua
Belgium	Greece	Norway
Bolivia	Guatemala	Pakistan
Brazil	Haiti	Panama
Cambodia	Honduras	Paraguay
Canada	Indonesia	Peru
Ceylon	Iran	Philippines
Chile	Iraq	Saudi Arabia
Colombia	Laos	South Africa
Costa Rica	Lebanon	Turkey
Cuba	Liberia	United Kingdom
Dominican Republic	Luxembourg	United States
Ecuador	Mexico	Uruguay
Egypt	Netherlands	Venezuela
El Salvador		Vietnam

Czechoslovakia, Poland, and the USSR, represented at the Conference, did not sign the Treaty. Burma, India and Yugoslavia, invited, were not represented. China, already divided, was not invited.

In a statement to the Conference, the United States waived its claim to the benefit due to it under the terms of Article 16. The Treaty became effective on 28 April 1952.

Having been invited to attend the Conference for the peace settlement with Japan, the International Committee of the Red Cross¹ sent to San Francisco a mission led by the President, Mr. Paul Ruegger. Although the Conference proceeded in such a way that it was impossible to make any amendment to the draft text submitted to the Powers represented, Mr. Ruegger was able to assure himself of the free consent of the Japanese to the application of Article 16

¹ Hereinafter referred to by its initials, ICRC.

and to obtain the assurance that the other problems arising from the application of that Article could be solved by later talks with the Powers concerned.

II. ORGANIZATION OF WORK

Article 16 is an integral part of an international treaty which, by definition, binds the Powers Parties, but also provides for a mandate given to the ICRC, viz., to a non-governmental humanitarian institution which is not Party to the Treaty.

This exceptional legal situation is not however without a precedent. It is in fact known that the Geneva Committee's activity of assistance was recognized successively by the Diplomatic Conferences of 1864, 1904, 1929 and 1949. The Geneva Conventions of 12 August 1949 relative to the protection of war victims have, in addition, entrusted it with a certain number of responsibilities, particularly as regards supervision (Art. 126, Convention III; Art. 143, Convention IV). The ICRC is thus considered as being an implied subject of international law, which also explains the tasks which were entrusted to it at San Francisco.

First of all, it will be noted that Article 16 demanded of Japan an obligation combined with a choice. It had to "transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets to the International Committee of the Red Cross." Japan had thus an obligation both towards the other Contracting Parties, namely the Allied Powers, and the ICRC, charged with liquidating the assets and distributing the resultant fund "to appropriate national agencies for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable".

Article 16 thus set up an institutional arrangement implying:

- Japan's initial obligation as provider of the funds,
- the mandate given to the ICRC to undertake the distribution of these funds,
- the freedom left to it to determine the basis of equitable distribution,

- the designation of former prisoners of war and their families as beneficiaries,
- the intermediary of “ appropriate national agencies ” which decide on the role of the Allied Powers.

These High Contracting Parties were the principal agents of these distribution operations. It was in fact for the States to take the initial measures enabling the distribution to be effected as laid down. It was also for them to ensure the respecting of the provisions of Article 16 at all stages of liquidation and distribution. They should also be in a position to provide the ICRC with information necessary for it to accomplish its task on the basis of concrete facts.

In order to co-ordinate their action and facilitate co-operation with the ICRC, the governments of the beneficiary Powers set up a Working Party with headquarters in London. The Foreign Office of the United Kingdom convenes the members and ensures the functioning of the secretariat for its sessions. This Working Party is not empowered to engage the Powers it represents, but merely makes recommendations which have to be ratified before being put into effect. Such procedure involved delays which could sometimes be considerable.

The beneficiary Powers also appointed a more restricted Executive Committee on which only three Powers are represented, namely the Netherlands, Pakistan and the United Kingdom. Its main task was to bring the requisite technical discussions between Japan and the other governments concerned to a satisfactory conclusion so as to make available to the ICRC the assets as mentioned in Article 16.

It was also for the beneficiary Powers to nominate “ the appropriate national agencies ” to whom the ICRC was to entrust the distribution of funds for former allied prisoners of war or their families. These national agencies were designated by each of the governments concerned to draw up lists of persons eligible, fulfilling the conditions for qualification as laid down in Article 16 or as defined at meetings of the Working Party.

Several governments delayed in sending the ICRC the names of the national agencies responsible, which obliged it to give them several reminders. It also happened that the national agency was

changed during the preliminary operations of deciding on the actual number of beneficiaries.

The agencies appointed were as follows:

Australia	Australian Government
Belgium	Belgian Red Cross
Cambodia	Cambodian Red Cross
Canada	Canadian Commission for War Damage Claims
Chile	Chilean Government
France	Ministry for Ex-Servicemen and War Victims
Netherlands	Ministry of Foreign Affairs
New Zealand	New Zealand Government
Norway	Ministry of Social Welfare
Pakistan	Adjutant-General of the Army
Philippines	Philippine Red Cross
Syria	Syrian Red Crescent
United Kingdom	Ministry of Pensions and National Insurance
Vietnam	Ministry of Defence

As the other factor in the arrangement, the ICRC was represented at meetings of the Working Party or of the Executive Committee whenever questions of general interest were raised, or there were suggestions to be made to the beneficiary Powers or instructions to be asked of them.

As a private institution with a strictly humanitarian role, the International Committee was resolved to put its mandate into execution on behalf of former prisoners of war designated to benefit from these operations of indemnification.

The responsibilities thus devolving upon it in the liquidation and administration of considerable assets, and in their distribution to a large number of nationals of several different countries led it to set up a vigilance committee consisting of the following:

Chairman: Mr. Paul Carry, Doctor of Laws, Barrister, Professor of the Faculty of Law at Geneva University, now an honorary member of the ICRC.

- Members:* Mr. Ernest R. Froehlich, Doctor of Laws, President of the Foundation for the Organization of Red Cross Transport.
- Mr. Eugène Hasler, Doctor of Laws, former Judge on the Swiss Federal High Court.
- Mr. Frédéric Schnorf, former Director-General of the Swiss National Bank.
- Mr. Hans Bachmann, Doctor of Laws, now a member of the ICRC.

III. COLLECTION OF FUNDS

Compensation as laid down in Article 16 of the Peace Treaty of San Francisco involved the sale of certain assets for distribution among an undetermined number of beneficiaries. It was therefore necessary above all to know the amount of funds to be distributed.

1. Basic criterion

The Powers signatories to the Treaty have given a restrictive description of the funds earmarked for the former prisoners of war and their families, namely assets of Japan or of its nationals in countries which remained neutral during the war, or were at war with at least one of the Allied Powers. Such assets or their equivalent could be transferred at the discretion of the Japanese Government.

In the event of Japan's opting for the second solution, the ICRC made a reservation with a view to obtaining compensation from the Japanese Government for private assets coming within the provisions of Article 16. In addition, it made it known that it was not in a position to undertake valuation and transfer operations, nor competent to conduct political negotiations which might prove necessary for the conduct of these operations of a commercial character. In fact the funds were in countries which had been neutral during the course of the Second World War, or enemies of the Allied Powers, that is to say in countries which were not Parties to the Peace Treaty of San Francisco, and consequently in no way bound to the provisions of Article 16.

The checking of the assets involved, their realization and their transfer to the ICRC were therefore the responsibility of the Powers whose nationals were designated as beneficiaries of the distribution. The International Committee could only give support to their representations with a view to safeguarding the beneficiaries' interests.

Furthermore, the former prisoners of war and their families were dispersed in a large number of countries which moreover were not the same as those from which the funds emanated. The ICRC therefore asked that these assets be realized and handed over to it in freely convertible currency.

2. Application of the basic criterion

The Governments of the United States of America and the United Kingdom set about locating and evaluating the assets. They observed that the assets were to be found in Afghanistan, Germany, Italy, Portugal, Sweden, Switzerland and Thailand.

First checking enabled only very approximate estimates to be made of the amount of funds available under Article 16. The Powers holding them in fact were reluctant to give the required information, especially Switzerland where about half the funds had been placed, mostly representing private assets covered by banking secrecy. Estimates varied widely: the highest being thrice the lowest.

In addition, the countries where the assets were to be found themselves made counter-claims against Japan as war damages they considered to be due to them. They also maintained that these claims should be met before any assignment be made of the assets which they held. Whilst waiting to allow these demands, the Japanese funds mentioned in Article 16 were blocked, the net amount remaining unknown.

Liquidation as laid down in the San Francisco Treaty encountered yet another obstacle in the fact that Japanese public assets in the neutral or enemy countries of the Allied Powers had been placed under the control of the four Great Powers, namely Great Britain, the USA, the USSR and China. Two of these, however, were not signatories to the Peace Treaty of San Francisco.

Japan, for its part, wanted to avoid having to pay twice: in other words, it did not wish to assign these assets to States holding them and submitting claims under war damages, and also transfer the equivalent amount of these same assets as compensation to former Allied Powers. Finally, like many other countries at that time, Japan was short of foreign currency which did not facilitate the making of the necessary payments.

3. Liquidation of assets

After many representations and a succession of negotiations, resulting in considerable delays, the first funds paid to the ICRC were those representing Japanese funds in Thailand.

The United States and the United Kingdom established, and this was accepted by the other beneficiary Powers, that the purchase price of the Thailand Burma railway built by interned civilians and Allied prisoners of war in Japanese hands should not be included in the estimate of assets coming within the provisions of Article 16. The United Kingdom which was thus to receive £355,000 agreed to distribute this amount to persons whom Japan had forced to take part in the building of the railway. The total of Japanese assets in Thailand was fixed at \$2,500,000.

The other beneficiary Powers having made known their agreement to this amount, Thailand paid in to the ICRC in September 1953, half in US dollars and the other half in sterling:

£446,428/11/5 and
\$1,250,000.

The results of negotiations with the other countries holding Japanese assets took somewhat longer so that Japan was asked to remit their equivalent to the ICRC. The representatives of several governments of the beneficiary Powers approached it in this sense and the International Committee itself intervened in Tokyo where Mr. E. R. Froelich, member of the Vigilance Council, went to attempt to convince the Japanese authorities accordingly.

In autumn 1954, the Executive Committee finally sent to Tokyo a delegation which on 30 November signed an agreement with the

Japanese Government. Under that agreement the Japanese authorities undertook to pay the sum of £4,500,000 to the ICRC. The agreement duly received the approval of the beneficiary Powers.

After settlement of technical problems connected with exchange rates and methods of transfer, the ICRC received in May 1955 from the Japanese Government the following amounts:

£2,250,000 and

\$6,292,500.

The total collected by then, together with the funds already received from Thailand, amounted to:

£2,696,428/11/5 and

\$7,542,500.

These sums were at once suitably invested, until the ICRC should receive from the national agencies all the necessary facts to determine the number of parties entitled in each of the countries concerned and to calculate the amount of each national share on this basis.

IV. QUALIFICATIONS FOR ENTITLEMENT TO COMPENSATION FROM THE FUND

The ICRC did not wait for receipt of all the funds which were to be made available to it before determining the criteria according to which the funds were to be distributed, taking into account the discretion which the signatory Powers delegated to it in this connection.

In other words, to whom and how were the Japanese assets to be distributed?

Article 16 gives some guidance to the reply to these two questions by specifying “. . . to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan . . .”

The qualifying conditions conferring a right to indemnity were therefore, in general,

- membership of an allied army;
- captivity, as a member of an allied army, in Japan as a prisoner of war;
- subjection to excessive privation during that period of captivity.

1. Beneficiary Powers

The term “ Allied Power ” is defined in Article 25 of the Peace Treaty as follows:

“ For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, ¹ provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, ² the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favour of a State which is not an Allied Power as so defined. ”

This excluded nationals of countries which were not signatories to the treaty and nationals of countries which although signatories had not ratified the treaty.

There was for a long time incertitude about operations due to the fact that two countries, the Philippines and Indonesia, were very late in deciding whether to ratify the treaty or not; the Philippines did so, and Indonesia did not.

This considerably delayed the start of preparatory work in the Philippines and compelled the ICRC to place part of the funds in reserve for former Filipino prisoners of war, without knowing

¹ U.S.A., Australia, Canada, Ceylon, France, Indonesia, New Zealand, Pakistan, Kingdom of the Netherlands, Republic of the Philippines, United Kingdom of Great Britain and Northern Ireland.

² According to article 21 of the treaty, China and Korea were entitled to benefit from the provisions of some articles in the treaty but not those of article 16.

whether the funds would in fact be paid out to them. The margin of insecurity was large; Filipino former POWs seemed to account for about a quarter of all possible claimants.

In order to determine which of the Allied Powers were to benefit from the provisions of Art. 16, the ICRC requested them several times to inform it if members of their armed forces had been prisoners of war in Japan. The determining factor was membership of the armed forces, not nationality or residence. The Executive Committee, at its second session on 8 October 1953, when laying down the responsibilities of the beneficiary Powers, decided that it was for the Power in whose armed forces a former prisoner of war served at the time of his capture, to see that he receive his share, whatever his nationality and residence. An exception was, however, made in the case of those Powers which acquired their independence after the cessation of hostilities, who should themselves assume the responsibility for the defence of the interests of their nationals.

The last request was in February 1955, asking for replies to be sent before 30 April 1955; it enabled the following list of 14 beneficiary Powers to be drawn up:

Australia	Netherlands
Belgium	New Zealand
Cambodia	Norway
Canada	Pakistan
Chile	Philippines
France	Syria
Great Britain	Vietnam

The United States renounced claims to indemnity for members of its armed forces.

2. The “undue hardships” criterion

When deciding what criteria to adopt to ensure an equitable distribution of the Japanese assets, the ICRC had first to bear in mind the basic Red Cross principles and the intentions of the High Contracting Parties. It also endeavoured to ensure that solutions would be practicable and not delay the compensation operations in a manner incompatible with the objective.

The wording "... those members of the armed forces of the allied Powers who suffered undue hardships..." in Article 16 clearly revealed the intention of the States to individualize compensation. The Parties to the San Francisco Treaty did in fact intend to reach those former prisoners of war who had physically and morally suffered most from their captivity.

The same Parties however did not take into consideration the task facing the national agencies of undertaking—if any differentiation in the degree of suffering from case to case had to be made—thousands of thorough enquiries and then of comparing results. Apart from the difficulty of discounting subjective reactions in the face of such privation, it would have been necessary to set up a sophisticated administrative and medical organization. Such an undertaking would have taken a great deal of time—and there had already been considerable delay since the Treaty came into force—and would have absorbed a large part of the available funds. Consequently, the benefits for claimants would have been less and would have been even further delayed,

Having been entrusted with determining "the basis it deemed equitable" for the compensating of these former prisoners of war, the ICRC brought these considerations to the notice of the beneficiary Powers' Working Group at its first session from 4 to 6 March 1953. The consensus on that occasion was that, to speed up and facilitate the remittance of funds to the national agencies, it would be preferable to assume the following hypothesis as a basis:

"The number of prisoners having suffered excessive privation was proportionally the same in each of the national contingents".

It was therefore decided that each national quota would be directly proportional to the number of prisoners of war in Japanese hands.

Each national agency was therefore to receive the same amount for each prisoner recognized as an eligible claimant. As a result, compensations already paid out by some States to former POWs from Japanese assets abandoned under other provisions of the Peace Treaty were not taken into consideration for the distribution among the national agencies of the funds covered by Article 16:

the other refunds referred to had been forfeited to the States in whose possession they were, without any qualifying condition regarding their utilisation.

3. Membership of an allied army and captivity as a POW

According to Article 16, the beneficiaries had to be former members of the armed forces of an allied Power and to have suffered internment as prisoners of war in Japanese hands.

These two criteria were also examined by the Working Party during its March 1953 session. Membership of the armed forces was the main problem.

The Working Party decided that the criteria according to Article 16 should be interpreted strictly. Interned civilians and merchant-seamen were therefore not eligible even if they had been interned in the same camps as the POWs. It was also left to the ICRC to decide, in consultation with the governments concerned, whenever doubt arose on the question of membership of the armed forces of the Allied Powers.

Such problems did in effect subsequently occur in several countries due to the very special situations resulting from the war in the Far East and in the Pacific Ocean. Decisions to grant or refuse compensation as provided for under Article 16, in connection with cases raised by a country, were taken as "case law" by other countries where similar cases arose. In this way the ICRC endeavoured to ensure an equitable balance of solutions from case to case with a view to providing treatment which was as far as possible the same for all the former POWs concerned.

The following examples illustrate how the International Committee applied this criterion of membership of the armed forces: it excluded:

- all civilians;
- seamen of the merchant marine;
- the guerrilleros or members of resistance movements who were not members of the regular armed forces at the time of their capture.

It granted the benefits of Article 16 in respect of claims by:

- the United Kingdom, for the Hong Kong Police;
- the Netherlands, for the Mounted Police, the “ Stadswachters ” and the “ Landswachters ” demobilised shortly before the capitulation but taken prisoner before the demobilisation orders could reach them or could be carried out;
- France (armed forces in Indochina), for the “ Gendarmerie ”, the “ Compagnies républicaines de sécurité ”, the “ Garde républicaine ”, the “ Garde mobile ”, the “ Garde indochinoise ”, and children who took part in the fighting in Indochina provided they were the children of soldiers.
- the Philippines, for Filipinos of the US land and sea forces (“ Philippine Scouts ”) even for those who had acquired American nationality after their release from captivity;
- India or Pakistan, for East Punjabi moslems whose nationality (Indian or Pakistani) had not been decided.

The prisoner of war criterion, the ICRC decided, excluded claims in respect of members of the armed forces who had been killed in combat or when they were surrendering.

At the suggestion of the Australian Government, however, it was decided that the members of families of former POWs who died in or after captivity should receive the compensation which would have been due to them had the POWs survived. An appreciable part of the compensation funds provided for under Art. 16 was thus paid to the heirs of POWs.

(to be continued)
