

## Emerging Rights to the Reparation of Hibakusha and Nuclear Disarmament

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### Introduction

The Final Document of the 2010 NPT Review Conference noted that "[t]he Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law."<sup>1</sup> This perception has later come to be held in common with other non-NPT parties, with the exception of Israel, through various resolutions in the UN General Assembly.<sup>2</sup> At the same time, the above-mentioned Final Document also states that the Review Conference "affirms that all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons."<sup>3</sup> Various countries today, in the process of nuclear disarmament, cannot deny that a catastrophic humanitarian outcome would result from the use of nuclear weapons and that the relevant international laws should be observed. At the same time, the inhumanity of the use of nuclear weapons and the observance of the relevant international laws must be appropriately positioned in the "necessary framework" for the achievement and maintenance of "a world without nuclear weapons."

### The Human Suffering of Hibakusha in Hiroshima and Nagasaki as the core element of "humanitarian impact of nuclear weapons"

The existence of victims (Hibakusha) of the use of nuclear weapons is one of the centermost issues of the catastrophic humanitarian consequences of their use. The dropping of the atomic bombs on Hiroshima and Nagasaki has proven that catastrophic humanitarian consequences arise from the use of nuclear weapons. Concerning the two atomic bombs dropped in 1945, it is said that "[t]he number of killed and wounded, to say the least, amounted to more than 70,000 and 50,000 respectively, in Hiroshima, and to more than 20,000 and 40,000 respectively, in

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<sup>1</sup> See *The Final Document of the 2010 NPT Review Conference*, Conclusions and recommendations for follow-on actions, NPT/CONF.2010/50 (Vol. I), p. 19.

<sup>2</sup> In 2012, the above-mentioned sentences in the NPT Final Document were referred to in the UNGA Res. 67/33 (proposed by Malaysia), 67/34 (proposed by NAC) and 67/59 (proposed by Japan). India, Pakistan and DPRK voted for UNGA Res. 67/33, and DPRK also for 67/34, but Israel voted against both.

<sup>3</sup> See *supra*. note 1, p. 20.

Nagasaki" (Judgment in the Shimoda Case). The explosive power emitted from the atomic bombs dropped on Hiroshima and Nagasaki is said to have been equivalent to 16 kilotons and 21 kilotons, respectively, of TNT. The energy possessed by all the nuclear weapons in the world as of 2013 far exceeds that of the bombs dropped on Hiroshima and Nagasaki. At this Oslo Conference, it is of primary importance that the consequences of the use of the nuclear weapons that exist in the world today be accurately perceived in the light of the experience of Hiroshima and Nagasaki.

### **The legal status of Hibakusha in the Shimoda Case Ruling**

At the same time, we must also take note of the fact that the relief for these Hibakusha is beginning to be requested under "applicable international law, including international humanitarian law." Since Hiroshima and Nagasaki, developments have taken place in international law relating to relief for Hibakusha that cannot be overlooked.

In the so-called Shimoda case trial, the judgment handed down by the Tokyo District Court in Japan on December 7, 1963, 50 years ago, while sanctioning the dropping of the atomic bombs as breaches of international law, dismissed the claim for the payment of damages against the Japanese government.<sup>4</sup> The plaintiffs asserted that Japan's waiver of their claims for damages against the US under domestic and international law gave rise to an obligation for the government of Japan itself to pay damages. The three main reasons for the dismissal of their assertion were as follows. (1) "Generally speaking, the subject of a right in law is a person, who has the possibility of asserting his rights and of being bound by his duties in his own name. Accordingly, in order for a person to be a subject of a right in international law, there must be the possibility for him to assert his right and be bound by his duties in his name. It is still proper to understand that individuals are not the subject of rights in international law, unless it is concretely recognized by treaties as seen in ... [the] example of mixed arbitral tribunals. ... [T]here is no general way open to an individual who suffers damages from an illegal act of hostility in international law, to claim damages in international law." (2) The right of an individual to bring a claim under international law does not exist in domestic courts in either Japan or the USA (this being due to the principle of jurisdictional immunity of a foreign state under international law recognized in Japanese Courts and to the legal theory of so-called Sovereign Immunity under the

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<sup>4</sup> See Shimoda et al. v. The State, Tokyo District Court, 7 December 1963, *Hanrei Jiho*, vol. 355, p. 17; translated in *The Japanese Annual of International Law*, vol. 8, 1964, p. 231, available via <<http://www.icrc.org/ihl-nat.nsf/WebALL!OpenView>>.

law of the USA). (3) Since with regard to a claim under municipal law, the individual cannot ask for redress before the courts of Japan or the United States, there is no admitting the existence of even the claims in municipal law. Reflected here are, as pointed out by Judge Cançado Trindade of the International Court of Justice, "the insufficiencies of an international legal order being conceived and erected on the basis of an exclusive inter-State system."<sup>5</sup>

### **Emerging Rights to the Reparation of Hibakusha**

Contemporary international law, however, is beginning to confirm the necessity for the rights and relief of individual victims of breaches of international humanitarian law and international human rights law, including Hibakusha.

Firstly, the right to effective relief is recognized for victims of human rights abuses. Article 8 of the 1948 Universal Declaration Human Rights stipulates that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 2 (3) of the International Covenant on Civil and Political Rights stipulates that "[e]ach State Party to the present Covenant undertakes...[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." In addition, Article 6 of the International Convention on All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 13 and 41 of the EU Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 25 and 63 of the American Convention on Human Rights, Article 21 (2) of the Banjul Charter (African Charter on Human and Peoples' Rights), and so on all stipulate the guarantee of an effective remedy against human rights violations.

In addition, a number of human rights supervising bodies have expressed their opinions regarding violations of human rights during armed conflicts, and that jurisprudence is accumulating. Among the cases of human rights violations are included those committed by state organs and agents during military operations, and the various human rights supervising bodies passing judgment on these is in fact leading to an accumulation of jurisprudence regarding laws on acts of hostility.<sup>6</sup>

Secondly, the practice of UN organs is supporting the formation of a consensus

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<sup>5</sup> See Antonio Augusto Cançado Trindade, *International Law for Humankind*, Nijhoff, 2010, p.427.

<sup>6</sup> See Giulla Pinzauti, "Good Time for a Change: Recognizing Individuals' Rights under the Rules of International Humanitarian Law on the Conduct of Hostilities", in *Realizing Utopia The Future of International Law*, Antonio Cassese ed., OUP, 2012, pp. 575-576.

on the existence of individual rights in international humanitarian law. For instance, the UN General Assembly adopted the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" in 2005.<sup>7</sup> These principles and guidelines are confirmations of existing legal obligations,<sup>8</sup> but in contrast to the title, the structure of the document places the obligations of states at the center and does not focus on the rights of victims. However, it is important that the document does confirm that the obligation of relief for victims lies with the state.

In the Wall Case Opinion, the International Court of Justice found "further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned," clarifying the obligation of reparation imposed on the perpetrating state.

Thirdly, since the 1990s, international commissions have been established for the purpose of reparations to individual victims following armed conflict. These are, for example, the UN Compensation Commission established by the Security Council following the Gulf War in 1991, the Commission for Real Property Claims of Displaced Persons and Refugees that was set up by the Dayton Peace Agreement following the end of the civil war in the former Yugoslavia, the Housing and Property Claims Commission established in association with the Kosovo War in 1999, the Eritrea-Ethiopia Claims Commission set up under the Eritrea-Ethiopia peace agreement in 2000, the Iraq Property Claims Commission established after the Iraq War in 2003, and so on.<sup>9</sup> While each of these has differences, each of them has as its premise the notion that individuals have the right to claim reparation or restoration to the original state for damage due to breaches of international law stemming from, among others, armed conflict or suppression under a suppressive regime. A system to realize reparation for victims is also being prepared by the International Criminal Court,<sup>10</sup> and this also is premised upon the right of the individual to receive reparation.

Fourthly, in domestic courts thus far there has been a strong tendency to defend state sovereignty against attempts to claim reparation by individuals, but there are signs of change appearing. For instance, the judgment of the Hague Court of Appeal in the Netherlands on July 5, 2011 indicated the responsibility of the Dutch

<sup>7</sup> General Assembly Resolution 60/147, adopted on 16 December 2005, UNDoc. A/RES/60/147.

<sup>8</sup> See Principles and Guidelines, preamble para. 7.

<sup>9</sup> See Shuichi Furuya, "Draft Model Statute of an Ad Hoc International Compensation Commission" in International Law Association, Rio De Janeiro Conference (2008), *First Report of Compensation for Victims of War*, pp. 23-31, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1018>>.

<sup>10</sup> See Article 75 of the ICC Statute.

government to pay compensation in the case of the death of three Muslims in the Srebrenica massacre in 1995.<sup>11</sup>

Fifthly, it is also noteworthy that soft law instruments have been drawn up that recognize the right to reparation to victims of breaches of international humanitarian law. For instance, in 2003 the International Law Association established and began work in the Committee on Reparation for Victims of Armed Conflict, and the ILA Hague Conference in 2010 adopted the Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) (Resolution 2/2010). Deliberations on the procedural aspect on the rights to reparation are currently in progress.<sup>12</sup>

Finally, in the various treaties on disarmament law there is a gradual trend toward the strengthening of regulations concerning relief for victims. The 1993 Chemical Weapons Convention contains merely a provision of assistance for State Parties (Article 10), but the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Convention) requires States Parties "in a position to do so" to "provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims" (Article 6), and coming to the 2008 Convention on Cluster Munitions, "Victim Assistance" is provided for in an independent provision (Article 5). The 2006 Convention on the Rights of Persons with Disabilities was influential in the preparatory work for this Convention.

## **Conclusion**

These practices in international law strongly suggest that relief for Hibakusha is demanded in law and that reparation for Hibakusha is recognized as a right in international law.

Naturally, there are many issues. Rigorous academic examination will be necessary to determine whether or not from these various practices the rights of Hibakusha are established as *lex lata* in general international law. Further, even if the right of Hibakusha to reparation is realized, what form of relief will be considered for not only future possible Hibakusha but also past (and currently existing) Hibakusha is also a question that will require examination.

Nevertheless, those who would use nuclear weapons in the future will at least be unable to ignore relief for any possible future Hibakusha, and it is clear that they

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<sup>11</sup> English translation of the Ruling of July, 5, 2011 of the Court of Appeal in The Hague in the Srebrenica case, is available at < <http://www.rechtspraak.nl/Organisatie/Gerechtshoven/Den-Haag/Nieuws/Pages/RulingofJuly,5,2011intheSrebrenica-case.aspx>>.

<sup>12</sup> See documents of the Committee, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1018>>.

must be prepared to meet those costs. It should be unnecessary to argue that the way to avoid this burden would be to not use nuclear weapons any more.

In addition, it should be noted that the notion of "guarantees of non-repetition" is also becoming established as one form of reparation for victims (2005 "Principles and Guidelines," Principle 18 and 23,<sup>13</sup> and the 2010 ILA Declaration, Article 10<sup>14</sup>). This signifies that the pledge never to use nuclear weapons again can be considered as relief for Hibakusha.<sup>15</sup> This not only conforms to the current assertion of Hibakusha, the realization of this form of reparation also encourages, from a different perspective, the implementation of the obligation "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament."<sup>16</sup> Thus the establishment of the right of Hibakusha to reparation encourages nuclear disarmament and is an indispensable element in the "necessary framework" to achieve and maintain "a world without nuclear weapons."

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<sup>13</sup> Principle 18 stipulates "[i]n accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition" and Principle 22 exemplifies measures of guarantees of non-repetition.

<sup>14</sup> Article 10 provides "[t]he responsible party is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

<sup>15</sup> See documents released by Nihon Hidankyo (Japan Confederation of A- and H-Bomb Sufferers Organizations), available at <<http://www.ne.jp/asahi/hidankyo/nihon/english/about/about3-01.html>>.

<sup>16</sup> See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Rep. 1996*, p.267.