

The Impossibility of Responding to Nuclear Weapons Use, and the No More Hibakusha Lawsuits

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1. The Inhumaneness of Nuclear Weapons and a New Viewpoint: The Impossibility of Responding to Nuclear Weapons Use

(1) International Humanitarian Law and Nuclear Weapons Ban

The 1996 International Court of Justice Advisory Opinion held that the threat and use of nuclear weapons are generally contrary to international humanitarian law. Subsequently the 2010 NPT Review Conference Final Document stated, “The 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.” The response to this is an intensifying shift from the viewpoint of inhumaneness of using nuclear weapons toward making nuclear weapons illegal.

This initiative is boosting efforts to ban nuclear weapons from the perspective of international humanitarian law.

(2) What It Means to Violate International Humanitarian Law

The first public judgment on the use of nuclear weapons on the basis of international humanitarian law was made in the Shimoda Case, which was filed against the Japanese government by Japanese atomic bombing survivors (Hibakusha) because the government had waived its right according to international law to demand compensation from the US, which had dropped the bombs. Because the significance of this lawsuit is discussed in detail in these *Recommendations* by Professor Yoshiro Matsui, this paper will note only two observations made in the Shimoda Case: The atomic bombings were indiscriminate attacks that violate the doctrine of military objectives, and they violate international law because even after the cessation of hostilities they cause unnecessary suffering to combatants. The 1996 ICJ Advisory Opinion, while examining the same issues as the Shimoda Case, discussed the balance between military necessity and humanitarian considerations, including the maintenance of sovereignty, which more broadly concerns the use of nuclear weapons in general. At the three International Conferences on the Humanitarian Impact of Nuclear Weapons held in Oslo, Nayarit, and Vienna after the 2010 NPT Review Conference, discussion on these issues was joined by that on the possibilities of preparedness and response to the use of nuclear weapons, based also on the fundamental spirit of international humanitarian law.

(3) Hiroshima City’s “Report from the Committee of Experts on Damage Scenarios Resulting from a Nuclear Weapons Attack” and the Impossibility of Responding

Hiroshima City’s “Report from the Committee of Experts on Damage Scenarios Resulting from a Nuclear Weapons Attack”¹ of November 9, 2007 also discusses the possibilities of responding to the use of nuclear weapons.

The response after nuclear weapons are used consists of three stages: Gathering information for the response, determining response measures based on the information,

and implementing specific response measures. However, after the use of nuclear weapons, great difficulties are created by not only the catastrophic destruction of the heat rays and blast from nuclear explosions, but also by the attendant invisible radiation damage. These further aggravate the impossibility of responding after the use of nuclear weapons.

2. Lawsuits for A-Bomb Illness Certification, and Uncertainty as the Cause of Response Impossibility

This paper therefore discusses the lawsuits for A-bomb illness certification which are in progress in Japan, while keeping in mind the impossibility of responding to the use of nuclear weapons from the perspective of the attendant invisible radiation damage.

(1) A-Bomb Illness Certification Program and the Course of the A-Bomb Illness Certification Lawsuitsⁱⁱ

A-bomb illnesses are illnesses and injuries caused by radiation from the atomic bombings. The A-bomb illness certification program works in this way: When a legally designated A-bomb survivor (Hibakusha)ⁱⁱⁱ contracts an illness, and the program (1) recognizes that the illness was caused by A-bomb radiation and that (2) medical treatment is necessary, the illness is certified to be an A-bomb illness, and pays a benefit of somewhat over ¥130,000 (about US\$1,000) per month to the Hibakusha certified to suffer from that illness.

However, because for a long time the Hibakusha certified to have a-bomb illnesses accounted for a very small percentage (about 0.7% of the legally designated Hibakusha throughout Japan) of all legally designated A-bomb survivors, lawsuits to rectify this situation were filed in a number of places at the advocacy of Nihon Hidankyo (Japan Confederation of A- and H-Bomb Sufferers Organizations). Since 2003 lawsuits in various places have been in litigation, with the ultimate number of plaintiffs coming to 307, and venues in 17 district courts nationally.

Major issues in the lawsuits are, with respect to cause (radiation), assessing the impacts of residual radiation, and with respect to effect, the range of illnesses which are recognized as effects of that radiation.

Under the certification criteria adopted by administrative authorities at the time, the illnesses considered to be related to these effects were extremely limited, with the dose (which correlates to distance from the hypocenter) of the initial radiation (gamma rays and neutron radiation from the hypocenter) being the only criterion. Therefore A-bomb certification covered only malignant tumors and cataracts in Hibakusha who were exposed at close range (maximum 2 km), where actual initial radiation was intense. With regard to these, Hibakusha plaintiffs noted the actual state of exposure (the fact that Hibakusha who entered the cities immediately after the bombings, and those who were exposed more than 2 km from ground zero were found to have physical symptoms such as hair loss, purpura, and diarrhea, whose only conceivable cause is radiation), additionally pointed out problems such as the fact that the ABCC-RERF epidemiological data, which is the world's largest store of radiation impact data and is used as the basis for A-bomb illness certification, considers only initial radiation, and also submitted a large amount of medical data as evidence, thereby securing many victories in the courts. This led to a conclusion to the lawsuits in August 2009 by agreement between then-Prime Minister Taro Aso and Hibakusha representatives, in which the government ended cases being litigated in higher courts after plaintiff victories (at that time about 90% of cases were won by plaintiffs) by withdrawing its

appeals, paying monetary settlements also to plaintiffs who had lost, and coming to an agreement by which regular consultations would be held to provide for solutions through these consultations so as to avoid the need for disputes in the courts.

(2) Subsequent Administrative Responses and New Lawsuits

But this did not stop the disputes. Especially after the Fukushima Daiichi nuclear accident, which occurred in conjunction with the Great East Japan Earthquake on March 11, 2011, government agencies were afraid that assessment of radiation effects would extend to disaster victims in Fukushima, colluded with experts involved in A-bomb illness certification, and in time came to put up strong resistance.

This resulted in the filing of new collective lawsuits called the No More Hibakusha Lawsuits, which now count more than 100 people among their plaintiffs.

(3) Points at Issue, and the Difficulty of Assessing the Residual Radiation Effects

Let's take a look at the problem of residual radiation, which is one of the lawsuits' issues.

The atomic bombs dropped on Japan exploded above ground, about 600 m at Hiroshima about 500 m at Nagasaki. Upon detonation, criticality is achieved and a chain reaction occurs. This results in a high-temperature, high-pressure plasma called a fireball in the bomb's center. Its rapid expansion releases heat rays and a blast, as well as neutron radiation and γ rays. The fireball's size depends on the bomb's explosive force. In the case of Hiroshima it is estimated to have been about 280 m in diameter, so at both Hiroshima and Nagasaki, the fireballs did not reach ground level.

As such, until now it has been assumed that fission products that were inside the fireball were atmospherically dispersed and that there was not much soil activation, which would mean there is little residual radiation, but Hibakusha who entered the cities after the bombings, or who were far away also displayed conditions which were attributable only to radiation, such as hair loss, purpura, diarrhea, and laryngopharyngeal lesions, and even in the postwar years these Hibakusha have suffered poor health and other maladies. For this reason, whether the physical changes which occurred in these Hibakusha who were distant or later entered the cities were caused by radiation or not has long been disputed. Although explanations of fission-product fallout (black rain, black soot, radioactive fine particles) was offered in lawsuits as well, a recent issue has been the extent to which the activated substances on the ground including brackish water which were kicked up into the air by the nuclear explosions were caught in the mushroom clouds.^{iv}

Lawsuits were filed by 116 Hibakusha around the nation who found the government's response after the aforementioned agreement unacceptable, and 26 of the 32 plaintiffs covered by the district decisions handed down to date (as of January 30, 2015) have been victorious.

3. International Humanitarian Law and the Possibility of Addressing Nuclear Weapon Use, Through A-Bomb Illness Certification Lawsuits

(1) Scientific Advances and Changes in Norms

To accommodate the advances in the technologies we ourselves have created, and the social changes which occur in conjunction with those advances, humanity has continually made changes in the norms that members of society are supposed to follow.

In every sense, humanity now faces hard questions about the nature of its society and actions with regard to how it should deal with the civilization it has created.

(2) Predictability as the Precondition for Addressing Nuclear Technology

In this sense one of the greatest tasks imposed on humanity is addressing nuclear technology and nuclear energy, especially the problem of how to addressing nuclear weapons.

In making predictions about human actions and human societies, including the prediction of an adversary's actions, the accuracy of information is of the utmost importance. With respect to information, often we depend on technology and take advantage of it, with our use of information ultimately depending on value judgments that are based on emotions to some extent. Under such circumstances, one response taken to armed attack is counterattack, and another is relief, i.e., providing assistance to people.

But prediction is extremely difficult for responding to the use of nuclear weapons. In the case of a nuclear bomb, it is nearly impossible to judge the yield of a bomb used by an adversary, and the attacked country likely thinks that unless it counterattacks, its own society will be erased. Also, it is almost impossible at that point in time to predict if one will, during and after the attack, be heavily impacted by radiation (further, when considering military effectiveness which assumes the doctrine of military objectives, it is unlikely that nuclear weapons would have to be used instead of conventional weapons except for the destruction of underground silos, but their use would produce large amounts of radioactive substances).

Further, relief provided after nuclear weapons are used presents a huge dilemma. Only a handful of scientists knew that the atomic bombs dropped on Hiroshima and Nagasaki, which were called "new-type bombs," were nuclear weapons. For that reason, not a few of the people who entered the cities to provide relief lost their lives because of residual radiation, or have suffered ill health because of it. Parents who entered the cities with their children continued to regret that action. The uncertainty of these radiation effects heavily influences relief efforts. On the occasion of the nuclear accident that happened during the Great East Japan Earthquake, it was known that radioactive substances were being emitted, which was not so for the atomic bombings. Because of that, even though it was known that some people had survived the earthquake and tsunami, the radiation persuaded relatives and authorities to give up trying to save people who perhaps could have been saved, and hospital inpatients who were needlessly relocated in order to avoid the effects of radiation lost their lives. It is impossible to take the most appropriate actions in chaotic circumstances.

Especially after a nuclear explosion, it is impossible to make appropriate judgments about the extent of contamination.

Not a few Hibakusha have very guilty consciences because they themselves survived. That is because they blame themselves strongly for what they abandoned in a bid to survive amid the hellfire at the time of the bombings. If nuclear weapons are used again, people will be confronted with an even bigger dilemma because they will know about contamination by radioactive substances.

(3) Nuclear Weapons Destroy the Basis of Humanity

The foundation of international humanitarian law is assumed to be the guarantee of decent, human actions. The fact that the Red Cross arose from providing relief for soldiers is because of the guarantee for such human actions. But nuclear weapons do not

allow human actions in this sense. Counterattacks cannot be rational or human, and with respect to relief as well, people are pressed to make the inhuman judgment on whether to help someone or abandon them. When considered in this way, the only possible answer is that, in whatever sense, the use of nuclear weapons is incompatible with international humanitarian law.

- i Report from the Committee of Experts on Damage Scenarios Resulting from a Nuclear Weapons Attack.
<<http://www.city.hiroshima.lg.jp/www/contents/0000000000000/1269591515524/files/houkokue1.pdf>>
- ii The trials for Recognition of A-Bomb Injuries and the Feelings of Hibakusha <http://www.hankaku-j.org/data/jalana/oslo_201305_004.html> (in Japanese). The trials for Recognition of A-Bomb Injuries and the Feelings of Hibakusha <http://www.hankaku-j.org/data/jalana/oslo_201305_004.pdf> (in English).
- iii Under the current legal regime (Atomic Bomb Victims' Relief Law), people who were within a certain distance from the hypocenter (about 4–5 km from the hypocenter) when the bombs were dropped, people who came within 2 km of the hypocenter within two weeks after the bombings, and others are issued Atomic Bomb Survivor's Certificates, and are Hibakusha in the legal sense. For these legal Hibakusha, public funds cover the copayment portion of their health insurance (Japan has universal health insurance).
- iv "Workshop Report on Atomic Bomb Dosimetry — Residual Radiation Exposure: Recent Research and Suggestions for Future Studies," George D. Kerr et al., *Health Phys.* 105(2):140–149; 2013
"Gamma-ray thermoluminescence measurements: a record of fallout deposition in Hiroshima?" Stephen D. Egbert, George D. Kerr, *Radiation and Environmental Biophysics*, May 2012, Volume 51, Issue 2, pp. 113–131.