

Japanese Lawyers' Recommendations for the 2015 NPT Review Conference

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To My American Friends

Takeya Sasaki, Lawyer

President of the Japan Association of Lawyers Against Nuclear Arms

1. Introduction

Last December the US Congress passed the Manhattan Project National Historical Park Act, which makes a national historical park out of sites with facilities related to nuclear weapons development at Los Alamos in New Mexico, Hanford in Washington, and Oak Ridge in Tennessee.

In atomic-bombed Hiroshima and Nagasaki there are concerns that this park might become a shrine to the development and use of the atomic bombs.

This year celebrations of the war victory 70 years ago will be held in various places throughout the US, and there will likely be much excitement. Here in Japan it is 70 years since the atomic bombings, and more people are saying that humanity and nuclear weapons cannot coexist, and that we should abolish nuclear weapons. There are concerns that atomic bombing survivors are aging and dying, and that those who knew what the bombings were really like will be gone. As such, we are wondering how to preserve their memories. Mainly on August 6th and 9th, the bombing anniversaries, there will be many events for a world free of nuclear weapons. Definitely, come and visit Hiroshima then.

2. Views of Foreign High School Students Studying in Hiroshima

The Hiroshima newspaper *Chugoku Shimbun* has a feature called “Peace Seeds” in which 44 students from 6th- to 12th-graders, who conceive and expand upon the importance of peace and life from a number of viewpoints, come up with themes, gather material, and write the feature, which is subtitled “Teens in Hiroshima Sow Seeds of Peace.”

This year’s January 22 “Peace Seeds” used “International students share impressions of Hiroshima” as subject matter for an article on how junior writers and six foreign students in Hiroshima high schools see the atomic bombing damage and the city’s current state, and their conversations on the Hiroshima bombing and peace.

Jonathan Valuriya, a 17-year-old US student, said, “The atomic bombing was a sad event, and it’s something I don’t really want to think about. In the United States, we were only taught that the atomic bombings were unfortunate, but if it had not been for the bombings, the war would have gone on. Nuclear weapons aren’t bad. They provide deterrence. People know the risk of using nuclear weapons, so no one will actually use them. Because they’re kept under tight control, it’s unlikely that terrorists can get their hands on them.”

3. Views of Hiroshima Junior High School Students

Riho Kito, a Hiroshima 7th-grader, responded to this view by saying, “Honestly speaking, I was shocked to hear someone from a nuclear weapon state say that ‘Nuclear weapons aren’t bad,’ or that they don’t know about this issue and aren’t interested. I thought something must have left an impression on them during their time in Hiroshima. If they think there’s a risk in possessing nuclear weapons, they should be more concerned about this and should be thinking that these weapons should be abolished.”

Just as students in American schools are not taught about the atomic bombings, in our country students are not taught modern history about what a reckless war of aggression we committed against our neighbors and other Asian countries, and increasing numbers of people in younger generations are ignorant of the war that previous generations caused. I feel

the need for peace education.

4. Did the Atomic Bombs Really End the War?

Since the end of World War II, it has continuously been said that “the atomic bombs ended the war,” but that is wrong. There is a deep-rooted mythology that contradicts the general knowledge of historical research, and here again one feels the importance of education.

On August 6, 1945 Japan had hardly any capacity for continuing the war. Japan had lost nearly all its warships, it had not a single aircraft which could fly at altitudes of 10,000 meters like B29s, and not a single anti-aircraft gun that could shoot them down. At least 200 cities throughout Japan including Tokyo, Osaka, and Nagoya had been attacked from the sky and sea. Because of US bombings, which continued until August 15 when the war ended, 330,000 people died, 430,000 people were injured, and as many as 9.7 million people had lost their homes and belongings. The land was completely devastated.

Japan’s surrender was a matter of time. The situation was such that even without using the atomic bombs, Japan’s loss was assured, and the US military knew this from Japanese communications that it had decoded.

On May 7 Germany had surrendered unconditionally. The next day a cease-fire was proclaimed, and the war in Europe ended. At the Yalta Conference the US, UK, and USSR had made a secret agreement that within three months of Germany’s surrender the USSR would join the war against Japan. During this three-month period, on July 16 at the Alamogordo bombing range in New Mexico’s desert, humanity’s first nuclear test using plutonium, Trinity, was conducted.

The US government conducted this test so that it would occupy Japan, make the USSR give up domination of East Asia, and secure an advantageous position against the USSR, and then the US went on to drop the atomic bombs on Hiroshima and Nagasaki under a global strategy by which it would take the lead in postwar world politics, and which was backed by nuclear weapons.

The bombings were cruel, indiscriminate attacks that violated international law. They were blind bombings aimed at ordinary people, who were noncombatants, and at cities. They were nuclear tests which completely destroyed people and cities. There was no reason or need at all to use nuclear weapons.

By December of that year the atomic bombings had claimed 140,000 lives in Hiroshima and 74,000 in Nagasaki. In Hiroshima on August 6 the people who died instantly or within the day totaled 70,000. Human beings were burned and charred like tree leaves, and there were piles of corpses. The city disappeared in an instant. The atomic bombings were the biggest acts of violence in human history, and the word “unfortunate” is totally inadequate to describe them.

5. “Nuclear Weapons Aren’t Bad”?

Let’s examine the damage of the atomic bombings.

(1) First is radiation. Even before a bomb’s explosion, nuclear fission chain reactions were already occurring within its vessel, and radiation was being released.

Neutron radiation, which is extremely powerful, exited through the steel vessel, reached the ground, and damaged people’s bodies while passing through them.

One-tenth of a second after the explosion, a fireball of gamma rays emitted by the bomb attained a temperature of 7,700 degrees, which is hotter than the sun, grew to 400 meters in diameter, and burst. The resulting neutron radiation and gamma rays instantly ripped through people’s bodies, damaging their cells and DNA.

But exposure to the initial radiation is not the only problem. People were also exposed to the residual radiation of deadly nuclear fission products, unfissioned nuclear materials, induced radioactivity emitted by activated objects, radioactive fallout from the sky, and other sources. Victims received not only external exposure, but also internal exposure from alpha rays, beta rays, and other radiation ingested by eating, drinking, and breathing.

(2) Second is heat rays. After the initial radiation, people were assaulted by powerful, blinding heat rays. People who were outdoors had no time to hide, and were severely burned by the heat rays. Nearly all the people within 1 km of ground zero and with no shielding died within a week.

(3) Third is the shock wave. After the heat rays came the shock wave and blast. The shock wave blew buildings away; 10.1 seconds after the explosion it reached a radius of 4 km, erasing the city of Hiroshima.

(4) Fourth is fires. Buildings within 3 km of ground zero spontaneously ignited because of the heat rays. The simultaneous occurrence of many buildings created a huge fire that completely burned 90% of the houses within a 3-km radius.

(5) Fifth is the black rain. The “black rain,” which contained radioactive substances, wet people’s heads, faces, and bodies, and exposed them to radiation.

(6) And finally there are the atomic bomb-induced illnesses. Immediately after the bombing, radiation made the victims suffer acute symptoms such as bleeding from their noses and gums, and loss of their hair. They also had fevers and diarrhea, which killed many people.

Owing to radiation exposure, the bombing survivors’ cells were damaged and their DNA was torn. Many survivors suffered late-onset diseases such as cancer and leukemia 10 years or more later because damage was repaired with errors.

Atomic bombing survivors have lived through the postwar years while always staring death in the face, and some still live now, while suffering with chronic illnesses (aftereffects) such as cancer, leukemia, heart attacks, impaired liver function, cataracts, and hypothyroidism.

We lawyers have initiated lawsuits against the government contending that the survivors’ illnesses are caused by the atomic bombings, and continue to win (see the paper by Masayoshi Naito among these *Recommendations*).

6. In Your Country, Too

The village of Tularosa, about 65 km southeast of the Trinity test site, and people living in, as well as people from, the surrounding area claimed that it is evident that there is an unusually large number of cases, including people born after the war, of thyroid cancer and other solid cancers, and of leukemia, with the only conceivable explanation being that they ingested food and water contaminated with radioactive fallout, and suffered internal exposure. On January 5 of this year there was a newspaper article stating that these people are seeking a legal amendment so that they too would be covered by the Radiation Exposure Compensation Act (RECA), which applies to onsite participants of atmospheric nuclear testing at the Nevada Test Site, to downwinders who lived nearby, and to uranium mine workers.

Last September a National Cancer Institute research team launched a study of radiation exposure. They interviewed nine people who had lived in the area since the days of the tests, and plan to cover more people. These people too likely suffered in the same way as Hiroshima and Nagasaki survivors. “Nuclear weapons aren’t bad” is simply not a tenable statement.

7. Are Nuclear Weapons Kept Under Tight Control?

Nuclear weapons are not put in armories and kept under tight control. In your country, in which direction are nuclear weapons aimed? It is likely that India aims its nuclear weapons at Pakistan, which aims its at India. Countless nuclear weapons are deployed so they can be used at any time, and they are on kept on standby. And nuclear weapons are mobile because they are carried around in aircraft and on submarines.

It is said that from 1950 to 1968 there were about 700, or perhaps more, incidents such as accidents by aircraft carrying nuclear weapons. Although we lack much information because for reasons including military secrecy, the accidents cited below are public knowledge.

The first was in 1961, when an Air Force bomber carrying two hydrogen bombs that were each 260 times more powerful than the Hiroshima bomb crashed because of a fuel leak near Goldsboro, North Carolina. One bomb was carried by its open parachute and landed in a pasture, caught in a tree. Do you know about this accident? The arming mechanism was activated by the shock. Three of four safety mechanisms did not work, and the fourth miraculously averted a major catastrophe.

The second happened in January 1966 when a US Air Force B-52G carrying four hydrogen bombs collided with a KC-135 tanker during an attempt to refuel and crashed near Palomares, Spain. Uranium and plutonium were scattered and contaminated the soil. Even now, plutonium exceeding the standard is detected at the site.

The third was in 1968, when a US Air Force B-52 carrying four hydrogen bombs had a fire and crashed on sea ice near Thule Air Base in a Danish-administered area of Greenland. A nuclear warhead ruptured and caused widespread radioactive contamination.

There was also an accident near Japan in December 1965 when an aircraft with a hydrogen bomb fell off the US aircraft carrier USS *Ticonderoga* at sea 150 km southeast of Kikai Island.

Six years ago, in February 2009, there was an accident in the Atlantic Ocean when a French nuclear-powered submarine armed with nuclear weapons collided with a British submarine.

Catastrophic accidents were avoided, but as long as people handle nuclear weapons, there is no telling when an accident will happen, or when the weapons will be used. There is no basis at all for saying that “no one will actually use them.”

8. Let's Bid Farewell to Nuclear Weapons

In April 2010 the International Committee of the Red Cross issued a statement that nuclear weapons are inhumane. This was followed in May by an NPT Review Conference which issued a statement on its “deep concern at the continued risk for humanity represented by the possibility that these weapons could be used and the catastrophic humanitarian consequences that would result from the use of nuclear weapons.”

Since 2011 the UN General Assembly First Committee has continued to issue statements each year on the inhumaneness of nuclear weapons. The first statement was by 34 countries, which ballooned to 80 and then 125 countries, and last year's statement was by 155 countries.

Other than the UN, there were 127 government delegations at the Conference on the Humanitarian Impact of Nuclear Weapons in Oslo in March 2013, 148 at the second conference in Nayarit, Mexico in February 2014, and 158 at the third conference in Vienna in December 2014. The US government too found itself obliged to participate. A new trend toward abolition, which is driven by the inhumaneness of nuclear weapons, has boosted the global movement for abolishing nuclear weapons to the point where there is no turning it back.

Nuclear weapons are the instruments of hell. I think that whatever humans have created, they can also eliminate.

There are still as many as 16,000 nuclear weapons in the world. Even though their inhumaneness is an issue, and even though the US president has called for achieving a world without nuclear weapons, one sees no signs of an upsurge in the American movement to give up nuclear weapons. I wonder if you could tell me why.

9. An Overview of These *Recommendations*

We Japanese lawyers have considered many things to achieve a world without nuclear weapons, and have tried a number of approaches. This collection of *Recommendations* is a compendium of our research and practical action. The following paper by lecturer Toshinori Yamada explores the role of the “humanitarian approach” and future challenges, from the perspective of what we must do to expedite nuclear disarmament and abolish nuclear weapons. The third paper, by Professor Yoshiro Matsui, examines the Shimoda Case decision, which was the world’s first judicial decision on the use of nuclear weapons and ruled that the atomic bombings violated international law, by placing it in the context of the historical development of international humanitarian law. The fourth paper, by lawyer Masayoshi Naito, describes the No More Hibakkusha Lawsuits, which found that if nuclear weapons are used again, it will be impossible to deal with the result. Finally there is the paper by lawyer Ken’ichi Okubo, who calls for us to give up nuclear energy. His argument is based on the experience and lessons of the Fukushima Daiichi nuclear accident from 2010 through 2015. Lawyers Kazue Mori, Jun Sasamoto, and Yui Kayano offer critical comments. Mori writes about the model bill for an Anti-Nuclear Weapons Law which was produced and is under consideration by the Japan Federation of Bar Associations; Sasamoto discusses the relationship between the right to peace and the challenge of abolishing nuclear weapons; and Kayano offers an appeal, as a junior lawyer, for the abolition of nuclear weapons. I definitely want my American friends, and all the people who have gathered here in New York from around the world, to read this collection of *Recommendations*. And finally I’ll say it once more: Please come to Hiroshima.

Striving Toward Nuclear Disarmament, and the Humanitarian Approach

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1. Introduction

With the Ninth Review Conference of the Nuclear Nonproliferation Treaty (NPT) coming up this year, I review the current state of arguments regarding nuclear disarmament, and examine ways to further it.

This year, 2015, marks 70 years since the atomic bombings, the end of World War II, and the launching of the United Nations. Although we have also seen seven decades in which nuclear weapons were not used, those weapons still exist and continue to threaten humanity.

2. The Obligation for Nuclear Disarmament

The NPT, which this year marks its 45th year since entry into force, provides the legal basis for nuclear disarmament in Article 6. In 1995 after the Cold War, the NPT was extended indefinitely, and in conjunction with that, it has been repeatedly confirmed that Article 6 legally requires the abolition of nuclear weapons. According to the 1995 decision “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” the following measure is important “in the full realization and effective implementation of article VI”: “[t]he determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons.” In the 2000 Final Documents, the Conference agreed on “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.” In the 2010 Final Document, “[i]n pursuit of the full, effective and urgent implementation of article VI of [NPT]”, the Conference agreed on 64 Action Plans on nuclear disarmament which includes concrete steps “for the total elimination of nuclear weapons.” In the 1996 Advisory Opinion, International Court of Justice (ICJ) also held that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

Performance of this obligation for nuclear disarmament has still made no progress. Last year the Republic of the Marshall Islands filed suit in the ICJ over this issue, and non-nuclear weapons states are becoming increasingly frustrated with the delay in nuclear disarmament.

3. The Humanitarian Approach

In relation to the disarmament effort, starting with the 2010 Review Conference the involved parties have widely discussed and strived toward the humanitarian approach to nuclear disarmament. So far, five joint statements have been issued, and three

international conferences have been held on this matter. The Final Document from the 2010 Review Conference 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 joint statements shared these elements: the importance that nuclear weapons are never used again under any circumstances, in view of the devastating consequences of their use, and the realization that the only way to insure that nuclear weapons are not used is to abolish them. At the three international conferences there was also a fact-based, profound recognition of the humanitarian consequences of using nuclear weapons, and it was emphasized that if nuclear weapons were used, humanitarian relief would be impossible. At the recent Vienna conference, participants shared a recognition of the current status regarding laws related to nuclear weapons use.

It is commendable that, thanks to this approach, efforts for nuclear disarmament are once again gaining traction.

There is, however, a counterargument from the standpoint of security. The 2010 Review Conference Final Document also said, “The Conference reaffirms that significant steps by all the nuclear-weapon States leading to nuclear disarmament should promote international stability, peace and security, and be based on the principle of increased and undiminished security for all.” A joint statement submitted by Australia to the 2014 UN General Assembly First Committee stated, “To create the conditions that would facilitate further major reductions in nuclear arsenals and eventually eliminate them requires the global community to cooperate to address the important *security* and humanitarian dimensions of nuclear weapons” (emphasis added).

Debate has not necessarily produced agreement on any specific plan for abolishing nuclear weapons. The New Agenda Coalition’s proposal is comprehensive, and the ban treaty advocated by the International Campaign to Abolish Nuclear Weapons (ICAN) has yet to be brought up specifically on the intergovernmental level. The chair’s summary from the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico said that the “time has come to initiate a diplomatic process conducive to this goal,” and further made mention of the firm belief that “this process should comprise a specific timeframe, the definition of the most appropriate fora, and a clear and substantive framework.” But the Austrian Pledge released at the subsequent Vienna conference merely called on all states parties to the NPT “to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.”

4. From the Illegality of Using Weapons to Their Abolition

Let’s take a look at past examples of transitioning from making weapons use illegal to abolishing them. In the disarmament field, abolition of a certain category of weapons has been achieved by using specific legal instruments. In many cases the use of weapons has been restricted or banned, which is then followed by a ban on their possession, and abolition. If we take biological and chemical weapons as examples, in 1925 the Geneva Gas Protocol was concluded, banning the use of poison gas and other weapons. This was followed by conventions which banned possession and made provisions for abolition (the 1972 Biological Weapons Convention and the 1993

Chemical Weapons Convention).

We can learn the following lessons from these examples.

First, countries possessing the weapons ultimately must resolve to get rid of them, and for the most part this decision has been brought about by participation in an abolition convention.

Second, as an antecedent to an abolition convention, there have been norms which restrict or ban the use of the weapon in question. One can regard these antecedent restriction and prohibition norms as having ushered in the subsequent abolition treaties.

Third, there is nevertheless a legal gap between the norms restricting and banning use, and the abolition treaties. The former have not entirely restricted or banned the use of the weapons in question. With the Geneva Gas Protocol, for example, some countries made a reservation on prohibiting use based on reprisal. Therefore norms restricting or banning use cannot alone assure the weapons will not be used, which necessitates abolition treaties.

Fourth, it was the requirement of humanity that closed this legal gap. The Biological Weapons Convention refers to the “conscience of mankind” (Preamble). The Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions both imply in their preambles that their conclusion is based on the interpretation and application of international humanitarian law (IHL), which emphasizes the requirement of humanity. It is significant that security is also given consideration, but that this was overcome and the conventions were concluded.

5. How About Nuclear Disarmament?

First, there is still no convention for abolishing nuclear weapons. Although it has been proposed, the nuclear-weapon states make no effort to seriously consider it.

Second, there are nevertheless norms for restricting and banning the threat and use of nuclear weapons. Although the ICJ Advisory Opinion did confirm the general illegality of the threat or use of nuclear weapons mainly on the basis of IHL, it avoided coming to a definitive conclusion on their legality “in an extreme circumstance of self-defense.” This does not mean there is no applicable law; existing law was insufficiently applied. At present, therefore, the issue between those who argue legality and those who argue illegality is how to interpret and apply the law. Whether such law exists or not is not the issue.

Third, there is accordingly a legal gap between norms that restrict or ban use, and abolition conventions. As the situation now stands, an abolition convention is essential to assure that nuclear weapons will not be used.

Fourth, there is now an initiative to strengthen the requirement of humanity for closing the legal gap, and that is the humanitarian approach noted above. There are expectations for the role of the requirement of humanity, which is a set of social norms. This is expressed as the views of nations, international organizations, and civil society. At the same time, however, there is a counterargument from the viewpoint of security, and that has yet to be overcome.

6. What Should We Do Now?

First, we need to stay on message: The use of nuclear weapons is illegal. At issue is

the law's application, but inasmuch as we cannot have full expectations for a solution in the ICJ or other court, we must constantly assert the illegality of nuclear weapons use in every venue of international society. Here the International Committee of the Red Cross as the guardian of IHL, and the Red Cross and Red Crescent Movement, have major roles to play.

Next we need to obtain broad-based support for the humanitarian approach and stigmatize nuclear weapons. This provides the power to close the legal gap. It is important here to condemn the use and threat of nuclear weapons on the basis of what we know as fact about the consequences of nuclear explosions. Doing so will encourage a reconsideration of nuclear-dependent security, i.e., the doctrine of nuclear deterrence. From the stance of the humanitarian approach, we should doggedly make an issue of the very inhumaneness of the threat of nuclear weapons (i.e., nuclear deterrence). That in turn requires us to further the quest for and deepen understanding of the principle of humanity, and to broadly share the profound understanding obtained thereby.

In connection with this, by way of an approach from the perspective of disarmament law, it is perhaps important to have the viewpoint that a nuclear deterrence posture itself in some ways hinders nuclear disarmament negotiations. One can indeed argue that the very maintenance of a nuclear deterrence posture not only violates the obligation under NPT Article 6 to stop the nuclear arms race at an early date, but also violates the obligation to pursue nuclear disarmament negotiations in good faith and bring them to a conclusion. On this point, it is worth watching the Marshall Islands Cases, in which the obligation for nuclear disarmament is at issue.

Last comes starting a debate on specific initiatives aimed at an abolition convention. It is perhaps not exactly necessary to add new articles that prohibit use, because there are already principles and rules which prohibit use. The presence of such provisions in the abolition convention might keep nuclear-weapon states from participating. And if nuclear-weapon states indicate that they will not participate in the convention with such provisions, that could give those states a pretext for arguing that there are no norms banning use, or that they do not need to apply, because those provisions formally do not bind them.

By contrast, referring to the application of the principles and rules of IHL in the abolition convention's preamble or other relevant instruments might make it possible to render a collective judgment on application of the law. Especially if a majority of countries participate, and the community of the State Parties to the convention comes to be regarded as representative of international society, such judgments might be seen as authoritative interpretations.

Further, in the event that nuclear-weapon states participate in discussions meant to establish an abolition convention, one could expect that the posture of those states would build trust among the involved nations, so that, during the process of shaping the convention, the conditions under which nuclear-weapon states would accept rules totally banning use would be created.

7. Conclusion

There are legal norms for banning nuclear weapons. Fully applying them would enable us to argue that all use of nuclear weapons is illegal. However, people who depend on nuclear weapons for their security do not agree with this interpretation and

application of the law. We must therefore elicit change in their position on interpretation and application of the law. And that will require further elaboration, evolution, and innovation of the humanitarian approach.



Palace and Gardens of Schönbrunn, Vienna

<Column 1> Abolition of Nuclear Weapons and the UN Declaration on the Right to Peace

Jun Sasamoto, Lawyer

Japan Committee of the International Campaign of the Right to Peace

The UN Declaration on the Right to Peace has been under deliberation by the UN Human Rights Council since 2008. The right to peace is a right by which people see the matter of peace as an individual right, make governments and international agencies stop violations of peace, and make them adopt peaceful policies.

In 2012 the HRC Advisory Committee, which is the Human Rights Council (HRC) think tank, produced a draft whose Article 3, Paragraph 3 (“Right to Disarmament”) reads, “All peoples and individuals have a right to live in a world free of weapons of mass destruction. States shall urgently eliminate all weapons of mass destruction or of indiscriminate effect, including nuclear, chemical and biological weapons.”

While the Nuclear Weapons Convention is an intergovernmental convention under which the governments of signatory nations would have obligations toward other governments, the right of the individual for abolishing nuclear weapons means that individuals have the right to demand that governments abolish nuclear weapons, and as such governments have obligations toward individuals. Thus, the abolition of nuclear weapons as a human right will help further intensify the groundswell toward abolition even under circumstances in which the Nuclear Weapons Convention has yet to be enacted.

In the HRC deliberations, consistent opposition to establishing the right to peace has been shown from the outset by the United States, Western European countries including EU member states, Japan, and the Republic of Korea.

In the 1st session of the Intergovernmental Working Group (February 2013), the US made the following statement about disarmament.

“The Human Rights Council is not a proper venue for disarmament discussion... There are no fewer than six UN or UN-affiliated bodies and offices dealing with disarmament. In Geneva, we have a conference of disarmament and in Vienna, the IAEA. In New York, we have the GA’s First Committee, the UN Disarmament Committee, the UN Office of Disarmament Affairs, and of course the Security Council.

All of these organizations and offices have their mandate to one extent or the other to control the manufacture, proliferation and use of these weapons. For example, the Conference on the Disarmament is the sole multilateral body for negotiating disarmament treaties. Moreover, this draft [of the Declaration on the Right to Peace] does not appear to stop at seeking to their work...”

To summarize the US statement in an easy-to-understand form, “Disarmament is the exclusive province of governments; individuals and citizens should mind their own business.” A possible interpretation of the US statement, which sees the right to peace as an impediment to disarmament, is that it reveals that nuclear disarmament makes little progress because negotiations are left to governments.

Establishing the right to peace is important also for transcending the framework of intergovernmental negotiations and making more progress in nuclear disarmament and abolition.

The Historical Significance of the Shimoda Case Judgment, in View of the Evolution of International Humanitarian Law

Yoshiro Matsui,
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Introduction

On December 7, 1963 Tokyo District Court handed down a decision (the Shimoda Case judgment¹) which ruled that the atomic bombings of Hiroshima and Nagasaki violated international law. This lawsuit (known internationally as the Shimoda Case) was filed by Ryuichi Shimoda and four other plaintiffs who were victims of the Hiroshima and Nagasaki bombings seeking compensation on the assumption that the bombings were illegal. Although the Court rejected their demand for compensation, it determined that the bombings were illegal in light of the principles of contemporary positive international law.

This paper places the Shimoda Case within the subsequent evolution in international law — particularly the advance from the “laws of war,” under which the benefit of the law is assured equally for all belligerents, to international humanitarian law, whose focus is on protecting individual victims of war — and examines its historical significance.

I. Major Considerations in Assessing the Shimoda Case

1. Basic Issues in Assessing the Use of Nuclear Weapons According to International Law

The Shimoda Case judged the legality of the Hiroshima and Nagasaki atomic bombings under international law, and internationally it was also the first judicial decision on the use of nuclear weapons. Roughly there are two issues: First, whether international law applies to the use of new weapons for which there is no express prohibition, and second, whether the atomic bombings can be declared illegal based on two principles of the laws of war, i.e., doctrine of military objectives (principle of distinction) and banning the use of weapons which cause unnecessary suffering.

In view of the fact that the 1996 ICJ Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons (below, Advisory Opinion) also takes up these issues, the historical significance of the Shimoda Case judgment transcended the specific instance of the Hiroshima and Nagasaki atomic bombings, and presented an international law rationale that is applicable to the use of nuclear weapons in general.

In recent years the inhumaneness of nuclear weapons has come into the spotlight as a nuclear weapons abolition strategy. Let us examine the Shimoda Case judgment in

¹ An English translation of the verdict is available on the website of the International Committee of the Red Cross.

<https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/aa559087dbcf1af5c1256a1c0029f14d>

this respect.

2. Confirming the Application of International Law to the Use of Nuclear Weapons: Negating the Argument that It Does Not Apply to New Weapons

At times when new weapons appear, there is of course no customary law that specifically bans them, and also no treaties. Additionally, there is a strong traditional argument that it is permitted to use weapons which are not specifically banned by international law, and this claim is also made for nuclear weapons.

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

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

The judgment held that it is possible to apply interpretation and application by analogy of existing customary law and treaties, and the rules of international law that underpin them.

3. Assessment from Two Principles of the Laws of War

(1) Doctrine of Military Objectives (“Principle of Distinction”)

The decision judged that, “according to the customary rules generally recognized in international law concerning hostile acts, there is a distinction between a defended city and an undefended city” with regard to bombardment by land and naval forces, and that with regard to aerial bombardment under the Draft Rules of Air Warfare (1923), “It can therefore be said that the prohibition of indiscriminate aerial bombardment of an undefended city and the principle of military objectives contained therein are rules of customary international law in view of the fact that these are also found in common in the rules of land and sea warfare.” Invoking this, the decision stated, “It is beyond dispute” that because Hiroshima and Nagasaki were undefended cities which, even though having defense facilities and military units, were far removed from battlefields and not in danger of being occupied by enemy forces, “Therefore, since an aerial bombardment with an atomic bomb brings the same result as a blind aerial bombardment from the tremendous power of destruction, even if the aerial bombardment has only a military objective as the target of its attack, it is proper to understand that an aerial bombardment with an atomic bomb on both cities of Hiroshima and Nagasaki was an illegal act of hostility as the indiscriminate aerial bombardment on undefended cities.”

Regarding the issue that no express related treaties exist, this decision based its

judgment on the doctrine of military objectives, a basic rule of the laws of war. In view of the fact that the subsequent Protocol I Additional to the Geneva Conventions of 1977 abolished the distinction between defended and undefended cities and fully applied the principle of distinction to both cases, this decision is commendable for its great contribution to the evolution of international humanitarian law.

(2) Prohibition of Weapons that Cause Unnecessary Suffering

The decision then invoked the 1868 St. Petersburg Declaration, which defines unnecessary suffering, and Article XXIII(e) of the Hague Regulations Respecting the Laws and Customs of War on Land, which provides for a ban on the use of weapons which cause unnecessary suffering, stating, “It is indeed a fact to be regretted that the atomic bombing of the cities of Hiroshima and Nagasaki took away the lives of tens of thousands of citizens, and that among those who have survived are those whose lives are still imperiled owing to its radioactive effects even now after eighteen years,” and that in light of this “it is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas, and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war which prohibits the causing of unnecessary suffering.” Calling attention to this point as well endows the Shimoda Case judgment with great significance.

4. Inhumaneness as an Assessment Criterion

Underlying the judgment that the atomic bombings of Hiroshima and Nagasaki violate international law was the recognition of the inhumaneness and cruelty of atomic bombs. Although the decision did not make a direct finding of fact on the state of harm from the Hiroshima and Nagasaki bombings, in concluding that “the atomic bombs have characteristics which differ from all conventional weapons, and must be said that they are truly cruel weapons,” it stated that “we have already observed the horror of the many kinds of physical damage” arising from the characteristic radiation of the atomic bombs. The decision concluded that the atomic bombs were inhumane based on the severe damage they caused, which is public knowledge in Japan.

II. Evolution of International Humanitarian Law and the Use of Nuclear Weapons

1. From the Laws of War to International Humanitarian Law: Shift in the Benefit of the Law

In response to Resolution XXIII, “Human rights in armed conflicts,” of the International Conference on Human Rights, Teheran, which was held to commemorate the 20th anniversary in 1968 of the Universal Declaration of Human Rights, the UN General Assembly took up the matter of “Respect for Human Rights in Armed Conflicts,” which started the legislative process of international humanitarian law that led to adoption of the Protocol I Additional to the Geneva Conventions of 1977.

Under the prohibition of use of force by the UN Charter, doubts arose in international humanitarian law about equality in the benefit of the law between aggressors and aggression victims, but benefit of the law is still upheld for protection of

individual victims of armed conflict.

Further, in recent times we have come to see a phenomenon which might be called the mutual permeation of international human rights law and international humanitarian law, and the world has adopted the view that protection under human rights conventions is not suspended even in times of armed conflict, except in special cases. One must keep such changes in mind when considering the application of humanitarian law to nuclear weapons use.

2. Protocol I Additional to the Geneva Conventions of 1977 and the Use of Nuclear Weapons

(1) Rigorous Observance of the Distinction Principle (Doctrine of Military Objectives): Articles 48–58

Additional Protocol I provides that “The civilian population as such, as well as individual civilians, shall not be the object of attack” (Article 51.2) and “Attacks shall be limited strictly to military objectives” (Article 52.2), and it unconditionally prohibits indiscriminate attacks (Article 51.4). The stance adopted here discarded the concept of defended and undefended cities in the traditional laws of war, upon which the Shimoda decision is based; instead, it applies the doctrine of military objectives, i.e., the principle of distinction, to all situations.

Considering together Article 51.4, which defines indiscriminate attacks, Article 54, whose intent is to reinforce civilian protections, Article 56, and others, there is no scope at all for the use of nuclear weapons to be legal under the Protocol.

(2) Reconfirmed Prohibition of Weapons that Cause Unnecessary Suffering: Articles 35 and 36

The protocol reconfirms the ban on weapons that cause unnecessary suffering in Article 35.2. This provision being a general rule, does it not apply to the use of nuclear weapons, for which there is no specific prohibition? But Paragraph 2 of the Protocol’s Article 1, “General principles and scope of application,” sets forth the Martens Clause by stating, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Therefore, if one reads the ban on weapons which cause unnecessary suffering, set forth in Article 35 Paragraphs 1 and 2, in conjunction with the Martens Clause in Article 1.2, it is clear that the prohibition applies also to the use of nuclear weapons.

(3) Protection of the Natural Environment: Articles 35.3 and 55

The Protocol incorporates the element of protecting the natural environment. Article 35.3 prohibits using methods and means of warfare “which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,” while Article 55.1 requires taking care to protect the natural environment against such damage, and prohibits the use of warfare methods and means “which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.” These articles are written in a way which strongly suggests that the anticipated environmental damage would not

be caused by conventional weapons, but by weapons of mass destruction such as nuclear weapons.

3. Use of Nuclear Weapons as a War Crime: Rome Statute of the International Criminal Court, Article 8.2(b)(xx)

For many years there was no mechanism for implementing the argument that the use of nuclear weapons constitutes a crime against humanity or is a war crime, but the entry into force of the Rome Statute of the International Criminal Court (ICC) in 2002 created an avenue for such a possibility. Article 8.2(b)(xx) of the Statute, “Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict,” builds on Article 35.2 of Additional Protocol I, and although it does not specify nuclear weapons, it can be read as a provision which assumes the use of nuclear weapons.

In the past, it was argued on the political-movement level that using nuclear weapons is a war crime, but now this is argued on the level of interpreting the Rome Statute, which is positive law. This fact clearly shows progress in the debate.

III. ICJ Advisory Opinion on the “Legality of Threat or Use of Nuclear Weapons”

1. Opinion Framework

The UN General Assembly sought an Advisory Opinion from the ICJ on the question, “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” In Dispositif (1) the ICJ decided to respond to the request for an Advisory Opinion, and in Dispositif (2) it examined the issue of legality or illegality.

In Dispositif (2) A through E the Court confirmed that there is no authorization in particular for the threat or use of nuclear weapons, nor is there any comprehensive and universal prohibition therefor, and went on to state that the threat or use of any kind of weapon is illegal if it violates Article 2.4 of the UN Charter and does not fulfill the requirements of Article 51, and that whether or not the possession of nuclear arms for deterrence corresponds to the “threat” in Article 2.4 of the Charter depends on whether the assumed use of force is prohibited by the article and, if for the purpose of self-defense, whether it violates the principles of necessity and proportionality.

The Court, having found that there are no treaty rules or customary rules which specifically prohibit the threat or use of nuclear weapons themselves, then moved ahead with a discussion of whether they are illegal in light of the principles and rules of international humanitarian law, and in Dispositif (2)E ruled that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

As the basic principles of international humanitarian law which should be the criteria for judging illegality, the Court here cites, first, the principle of distinction,

which prohibits indiscriminate attacks, and second, the principle banning weapons which cause unnecessary suffering. The Court then refers to the Martens Clause, and states that it “has proved to be an effective means of addressing the rapid evolution of military technology.” The Court goes on to state that most of the rules of humanitarian law are very fundamental to the respect of human individuals and “elementary considerations of humanity,” and that the rules “are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law,” thereby recognizing that the basic rules of international humanitarian law bind all countries as customary law.

One must take note of the facts that, in applying the basic principles of humanitarian law to nuclear weapons, the Court produced a detailed finding on “the unique characteristics of nuclear weapons,” that is, their inhumanness, and that it repeatedly emphasizes the “intrinsic humanitarian character” of international humanitarian law.

2. Assessment of the Advisory Opinion from Two Principles of International Humanitarian Law

(1) Assessment of Nuclear Weapons According to Humanitarian Law: Opinion Dispositif (2) E, First Half

However, while the Court itself recognized the inhumaneness of nuclear weapons, it is hard to understand the expression suggestive of exceptions, arrived at as a result of applying the basic principles of humanitarian law to their use, that it “would generally be contrary to the rules of international law.” Moreover, on this point the Court offers no concrete justification. It is more than evident that the use of nuclear weapons corresponds to indiscriminate attacks, which violate the distinction principle, and that they cause unnecessary suffering. To give no justification in spite of that was perhaps a last-ditch measure to avoid such an inevitable conclusion, open the way to an “exception,” and narrowly secure a majority of judges in favor.

What kind of “exceptions” are possible? The only possibility quoted by the opinion was that the use of low-yield nuclear weapons against warships at sea or troops in sparsely populated areas would have little secondary damage on civilians, which was argued by the UK and US. But even if this can be an exception to the distinction principle, it is not an exception to the ban on the use of weapons that cause unnecessary suffering. Even more of a problem is that the Court turned a blind eye to the Martens Clause, which the Court itself positively assessed as an “expression of the pre-existing customary law,” and conducted no specific consideration at all of the possibility of applying to nuclear weapons the basic principle of banning weapons which cause unnecessary suffering.

(2) Argument on the Right of Self-Defense: Opinion Dispositif (2) E, Second Half

As a possible exception, the Advisory Opinion suggested “an extreme circumstance of self-defense, in which the very survival of a State would be at stake,” but the matter of whether a certain use of force fulfills the requirement for self-defense is on the level of the judgment of whether it can be justified in light of the UN Charter and the law of self-defense, and if this is determined satisfy conditions, then next is the consideration of whether, in light of law applicable to armed conflict, there are violations involving the nature of the weapons or how they are used. Therefore, satisfaction of the conditions

for self-defense is not a reason for precluding the illegality of means and methods of warfare that violate the basic principles of humanitarian law. Here the Court committed a major contradiction in logic.

3. Obligation to Pursue in Good Faith and Bring to a Conclusion Negotiations Leading to Nuclear Disarmament: Opinion Dispositif (2) F

Finally, the Court stated, “F. There exists an obligation to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control.” Paragraph F does not correspond to the question set forth by the UN General Assembly, and as such arguably is *ultra vires* of the Court, but there is great significance in the fact that in the end the judges use this judgment to unanimously conclude their opinion, in which the Court had harshly clashed. This is certainly because the Court thought that the continued difference of opinion over the legal status of devastating weapons such as nuclear weapons would be harmful to international law and the stability of the international order.

Moreover, while at first glance this obligation appears to be a restatement of the NPT’s Article 6, it is not just an obligation for mere negotiations; in that the Court recognizes this as evolving this obligation into an obligation to achieve total nuclear disarmament by concluding negotiations in good faith, and that this dual obligation involves not only the 182 NPT parties, but demands the cooperation of all nations in the realistic pursuit of total and complete disarmament, especially nuclear disarmament, the Court arguably advances the existing discussion a step further.

Conclusion

During the 30-odd years between the Shimoda Case and the ICJ Advisory Opinion, the traditional laws of war that applied in the former evolved into international humanitarian law, as symbolized by Protocol I Additional to the Geneva Conventions of 1977. Under the laws of war, assuring the equality of belligerents was the main benefit of the law, but under international humanitarian law, the main benefit of the law is assuring the human rights and humane treatment of individuals, who are the victims of armed conflict, based on “elementary considerations of humanity.” The Shimoda Case judgment beautifully predicted this evolution of international law. In particular, it affirmed the application of the existing laws of war to the dropping of the atomic bombs, which were new weapons, and it rendered judgment on the legality of these new weapons based on the basic principles of the laws of war, i.e., the doctrine of military objectives (the distinction principle) and the ban on weapons that cause unnecessary suffering, which underscored the historical significance of the Shimoda decision in the sense that it provided a model that should be used when assessing the use of nuclear weapons under international law. Although the Advisory Opinion does not directly quote the Shimoda decision, that decision — known internationally as the “Shimoda Case” — had been published in English translation, and it seems likely that the ICJ judges had read the judgment. The Advisory Opinion in general follows the Shimoda judgment model.

Let us examine the extent to which the Advisory Opinion, which builds on the establishment of international humanitarian law, advanced the Shimoda judgment

stance toward banning the use of nuclear weapons and abolishing them. Above I pointed out the Advisory Opinion's problems, but it doubtless has several positive facets as well. The opinion put an end to the argument, which had persisted among nuclear-weapons powers and their academics, that the existing laws of war and humanitarian law do not apply to the use of nuclear weapons, which are a new type. The ICJ Advisory Opinion also emphasized the inhumaneness of nuclear weapons, underscored the humane character of international humanitarian law, and recognized that the use of nuclear weapons is "scarcely reconcilable" with the principles and rules of humanitarian law.

The Advisory Opinion's stumbling block was the argument for self-defense and the doctrine of nuclear deterrence which underlies it. One reason that the Court in the *dispositif* abandoned a judgment on the legality or illegality of using nuclear weapons in an "extreme circumstance of self-defense" was that it could not ignore the customary use of deterrence policy, to which "an appreciable section of the international community" had adhered to many years. Accordingly, overcoming nuclear deterrence doctrine is essential to confirm the total illegality of using nuclear weapons.

Overcoming nuclear deterrence doctrine also necessitates the establishment of a new view of security — a "human-security" view — that aims to guarantee the individual's right to live in peace. This would replace the traditional military-security view, which is based on the country. Nuclear deterrence doctrine is rooted in the most extreme inhumane thinking, in which another country's entire populace is held hostage for the "security" of one's own country. In this sense, deterrence is not only a contrary concept of international humanitarian law, but also a contrary concept of "human security."

Establishing the "human-security" view and overcoming nuclear deterrence doctrine requires the use of *realpolitik*, and both domestic and foreign public opinion play a major role in doing that, as shown by the Shimoda Case and the ICJ Advisory Opinion. It is well known that behind the Shimoda decision was the Campaign against Atomic and Hydrogen Bombs, which experienced a groundswell in the wake of the 1954 *Daigo Fukuryu Maru (Lucky Dragon No. 5)* incident, and that underlying the UN General Assembly resolution that sought the ICJ Advisory Opinion were the activities of the World Court Project, which was affiliated with the International Association of Lawyers Against Nuclear Arms (IALANA) and many other anti-nuclear NGOs. These anti-nuclear NGOs had significant influence over the ICJ's advisory proceedings, and it was an achievement of this campaign that the mayors of Hiroshima and Nagasaki, whose views differed from those of the Japanese government, participated in oral statements from Japan oral statements, which was highly unusual.

The heightening of humanitarian consciousness among the citizens based on the tragic experience of war has always underlain the advance from the laws of war to international humanitarian law. This advance was brought about mainly against the backdrop of the heightening of humanitarian consciousness among the citizens and the strength of the movement supported by it. There is no expectation that the "obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects" confirmed by the Advisory Opinion would ever be discharged if it were left entirely up to the governments of nuclear-weapon states and other countries. Even though the UN General Assembly has time and again passed resolutions to quickly initiate negotiations to abolish nuclear weapons, they have yet to begin, and this fact shows that we cannot expect any progress on the inter-state level

alone. Perhaps the only way to overcome this difficulty is the strength of international public opinion marshaled by the anti-nuclear movement. In other words, the anti-nuclear movement passed the ball to the ICJ, and the ICJ in effect threw it back. Surely now the true value of the anti-nuclear movement is being tested.

This paper is a summary produced by the secretariat of a keynote speech delivered at the Memorial Symposium for the 50th Anniversary of the Shimoda Case Judgment, which was hosted by the Japan Association of Lawyers Against Nuclear Arms on December 8, 2013 in Tokyo



Memorial Symposium for the 50th Anniversary of the Shimoda Case Judgment (Dec.8, 2013)

<Column 2> Steps Toward the Enactment of an Anti-Nuclear Weapons Law

Kazue Mori, Lawyer

1. Background of Efforts to Enact an Anti-Nuclear Weapons Law

The Nuclear Weapons Abolition Project Team of the Japan Federation of Bar Associations (JFBA) Task Force on Constitutional Issues is making preparations for enacting a “Law Prohibiting the Manufacture and Possession of Nuclear Weapons, and Their Introduction Into Japan” (Anti-Nuclear Weapons Law) in order to legislate Japan’s three nonnuclear principles.

Japan’s three nonnuclear principles are: “Japan shall neither possess nor manufacture nuclear weapons, nor shall it permit their introduction into Japanese territory.” These principles have long been considered to be fixed national policy, but have not been enshrined in law. Although Japan’s government avers that it firmly adheres to these principles, it admits that it cannot deny the possibility that US warships armed with nuclear weapons have called at Japanese ports, and suspicions of a “secret nuclear agreement” between Japan and the US have not been allayed. The Japanese government’s stance has consistently been that in a contingency it will allow the introduction of US nuclear weapons and depend on their deterrent capability.

Further, there have recently been initiatives aimed at switching to the “2.5 nonnuclear principles,” especially to seek a reconsideration of “not allow introduction.” To have the government uphold the three nonnuclear principles without letting them be hollowed, and to firmly establish the basis of a nonnuclear political policy, it is necessary to distinctly define the three nonnuclear principles as an integrated whole with quasi-constitutional normativeness.

Therefore we determined to make preparations for enacting an Anti-Nuclear Weapons Law for “the purpose of strictly complying with the three nonnuclear principles, which have long been considered fixed national policy, and never under any circumstance use or allow the use of nuclear weapons in Japan, thereby guaranteeing the peace and security of the Japanese people.”

2. Main Points of the Anti-Nuclear Weapons Law Model Bill

The model bill comprises a preamble and 16 articles.

The preamble explains the course of events leading to enactment.

Article 1 states that the law is enacted for “the purpose of strictly complying with the three nonnuclear principles, which have long been considered fixed national policy, and never under any circumstance use or allow the use of nuclear weapons in Japan, thereby guaranteeing the peace and security of the Japanese people.”

Article 2 defines “nuclear weapons,” which are the Anti-Nuclear Weapons Law’s area of concern.

Article 3 has provisions on prohibiting the manufacture of nuclear weapons, Article 4 on prohibiting their possession, and Article 5 on prohibiting their introduction.

Articles 6 through 9 set forth the duties of the prime minister (requirements for allowing the entry of all ships, aircraft, and other craft into Japanese territory, airspace, and territorial waters; demands to withdraw; seeking the opinions of the Nonnuclear Monitoring Commission; and making reports to the Diet).

Articles 10 through 12 provide for the creation of a Nonnuclear Monitoring Commission, its mission and inspections, and its organization and operation.

Article 13 provides for the “prohibition of disadvantageous treatment” in order to protect whistleblowers.

Articles 14 through 16 provide for penalties to ensure effective compliance with the three nonnuclear principles.

3. Expectations for the Enactment of an Anti-Nuclear Weapons Law

As the world's sole victim of nuclear weapons use, as the country which experienced the serious Fukushima nuclear accident, and as a country which belongs to Northeast Asia, Japan has a duty to play a leadership role in international society by working for the abolition of nuclear weapons and other threats to humanity's survival, and for banning the use and threat of nuclear weapons.

As a lawyer, and also from the standpoint of achieving the pacifism prescribed by the Japanese Constitution, I shall do my best to have an Anti-Nuclear Weapons Law enacted.

The A-Bomb Dome, Hiroshima →



Peace Statue, Nagasaki

8:15am, the Hiroshima Bombing Time

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

Masayoshi Naito, Lawyer

Head of Tokyo Legal Counsel for No More Hibakusha Lawsuits

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.

<Column 3> What the Next Generation Can Do to Abolish Nuclear Weapons

Yui Kayano, Lawyer

This is the 70th year since the atomic bombings, and the average age of the Hibakusha (atomic bombing survivors) is nearing 80.

During these seven decades the Hibakusha have taken the lead in the movement to abolish nuclear weapons. In judicial and political venues they have spoken for those who died, they have related their own bitter experiences, and they have pleaded that we should never repeat that tragedy.

But in international society, the necessity of nuclear weapons alone is emphasized from the perspective of national security, and the appeal of the Hibakusha has not always been considered important.

After many years attention is now focused on an approach that advocates the “inhumanity of nuclear weapons,” and Hibakusha testimony is in the spotlight.

Nuclear weapons cannot be permitted owing to their indiscriminateness, cruelty, and the persistence of their damage. And the best grounds for showing their impermissibility is the testimony of the victims, the Hibakusha.

Now that Hibakusha testimony is becoming a concrete force in the drive toward abolishing nuclear weapons, we must not stop this initiative. Because aging of the Hibakusha jeopardizes the memories of their suffering, we must keep their experiences from being forgotten. What we younger generations can do is listen carefully and seriously to the Hibakusha, and pass their testimony on to future generations.

There’s no need for the ability to give difficult explanations. On Instagram, you can connect instantly to the world just by posting photographs for peace with tags such as #Hiroshima, #Nagasaki, or #peace. On Facebook, even if you can’t explain something well in your own words, you can tell your friends what you’re thinking by “liking” peace-related articles, or by pressing the share button for them. If you can add a thought of even a few words, such as “Let’s get rid of nuclear weapons,” to a post by translating it into a foreign language, you may be able to find like-minded people who share your feelings throughout the world. We younger generations are good at making skillful and ready use of foreign languages, and technologies like social networking, smartphones, and computers. With just a few keystrokes, we can tell the world about all the thoughts and feelings in Hibakusha hearts.

When younger generations get involved in the movement to abolish nuclear weapons, that alone gives hope to the Hibakusha. It is very painful for them to recall the tragic experiences of 70 years ago and express them verbally. To cherish their words as a valuable asset for future generations would give the Hibakusha the courage to describe once again the reality of the atomic bombings.

The younger generations could play a role that is not at all insignificant. We should continue to join the Hibakusha in calling for the abolition of nuclear weapons.

I should think that the world can succeed in abolishing nuclear weapons when the appeal of the Hibakusha has transcended generations and international borders.

For a World Without Nuclear Arms Or Nuclear Energy: A Discussion Including Judicial Precedents from Japan

Kenichi Okubo, Lawyer

Secretary General of Japan Association of Lawyers Against Nuclear Arms

1. Introduction: The Situation

Our planet now has more than 16,000 nuclear weapons and 435 nuclear reactors. I would like to eliminate all of them. I agree with the view that “nuclear weapons and nuclear energy have the same root, and are the natural enemies of humanity,” and I concur with the view of Hibakusha (atomic bombing survivors) that “nuclear weapons and humanity cannot coexist.” I also firmly believe that it is possible to eliminate both nuclear weapons and nuclear energy because they are made and used by people. We need only create the intent to stop using them, stop making them, and abandon them, and then carry out that intent. Doing these things may be difficult, but they are not impossible. Let us start by surveying the current situation.

2. Legal Status of Nuclear Weapons and Nuclear Energy

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) prohibits the possession of nuclear weapons by non-nuclear-weapon states, but it holds that parties to the treaty have an “inalienable right” to the peaceful use of nuclear energy. Current international law not only allows the possession of nuclear weapons by multiple countries, but also says that the peaceful use of nuclear energy is a right. The intrinsic danger of nuclear energy is not subject to legal control.

And although the international trend toward banning nuclear weapons is gaining steam, nuclear-weapon states are putting up stiff resistance, and there is still no treaty banning them.

At present, nuclear weapons — the ultimate violence — and the urge to pursue profit by means of nuclear energy have a dominant position in international society. Those who desire to part with nuclear weapons and nuclear energy must shift away from this system.

3. The Japanese Government’s Stance

Japan’s government likewise depends on nuclear weapons and has not precluded their use. It also underestimates the impacts of radiation on human health. Additionally, it considers nuclear energy to be “an important base-load power source.”

This means that the Japanese government’s policy is to depend on nuclear technology as both weapons and an energy source. To the extent that there is no contradiction with dependence on US nuclear deterrence, the government states its compliance with the three nonnuclear principles and it advocates the abolition of nuclear weapons, but in reality Japan is dependent on those weapons. Additionally, Japan not only hurries to restart nuclear power plants, but also promotes the export of nuclear energy. The government considers nuclear weapons to be a trump card for national security, and nuclear energy to be a mainstay of economic activity.

Such is the current situation. There is a long road ahead.

4. Initiatives by Japan’s Lawyers

Japanese lawyers have filed a number of lawsuits in a bid to rid Japan of nukes. These include the Shimoda Case (see the paper by Yoshiro Matsui among these *Recommendations*), the lawsuits for A-bomb illness certification (see the paper by Masayoshi Naito among these *Recommendations*), and lawsuits to stop nuclear power plants.

The Shimoda Case confirmed the illegality of the atomic bombings, and lawsuits for

A-bomb illness certification certified the harm from radiation. Among the lawsuits against nuclear power plants is one that prohibited the restart of a nuclear plant (the Ohi Nuclear Plant Lawsuit decision). The reason was that, although it is claimed that operating nuclear plants helps stabilize the power supply and lower costs, one cannot argue about rights that impinge upon the very survival of countless people on the same level as the issue of whether electricity rates are high or low.

5. Characteristics of These Lawsuits

The Shimoda Case concluded that the use of nuclear weapons violates international humanitarian law. It adopts the legal norm that even if war is not illegal, there are means of combat that cannot be allowed. The lawsuits for A-bomb illness certification exposed the government's irresponsibility in determining the impact of radiation on human health. And the Ohi Nuclear Plant Lawsuit advocated the superiority of human rights over economic activity. What these lawsuits have in common is that they squarely recognized the severity of the damage, and applied laws that are backed by humanity and justice.

The government and electric utilities, which were the defendants in these lawsuits, came up with a variety of excuses. Intimidation and sophistry were employed liberally. But the plaintiffs circumvented these obstacles.

Overcoming the existing dominant rationale and values requires facts and reason, that is, demands based on humanity and justice, and a movement which involves a broad range of people. And when people succeed in achieving these, the courtroom's heavy doors are opened. When the courts exercise control over political power and big capital, the judicature does the job it is supposed to do.

6. Hibakusha Wishes and the Lawsuits for A-Bomb Illness Certification

The Hibakusha (atomic bombing survivors) want nuclear weapons to be abolished immediately, but the government says Japan depends on US nuclear deterrence. This is called extended deterrence, whose underlying idea is to guarantee national security by threatening to use nuclear weapons. This kind of thinking is totally incompatible with the Hibakusha wish that nuclear weapons be abolished while they are still living. What is more, extended deterrence condones the repeat of Hiroshima and Nagasaki, and runs counter to the desire of the Hibakusha to be the last victims of nuclear weapons.

In the lawsuits for A-bomb illness certification, the Hibakusha asked the court for its judgment on the effects of atomic bomb radiation on human health. The court recognized the existence of low-dose exposure and internal exposure, as well as their deleterious impact on human health. This means that the court criticized the government's determination of radiation damage as insufficient. Therefore the court confirmed not only the indiscriminate and cruel nature of nuclear weapons in the instant of their use, but also the permanent suffering they cause.

Because of the court's ruling, harm from the atomic bombings was not limited to heat rays, bomb blast, and direct radiation, but added the low-dose exposure and internal exposure from residual radiation. This outcome must be used to advantage in dealing with the Fukushima disaster.

7. From Hiroshima and Nagasaki to Fukushima

In a conventional war the damage ends with the war, but radiation damage from the atomic bombings not only did not end with the war, but continued into the future.

This characteristic represents a similarity with the Great East Japan Earthquake and the Fukushima nuclear accident. The tragedy and misfortune caused by the earthquake and tsunami are certainly unprecedented, but although the earthquake and tsunami have ended,

the victims of the nuclear accident — while perhaps suffering no immediate effects — must live in fear of health impacts which may occur at any time.

During the lawsuits for A-bomb illness certification the government stubbornly refused to recognize the radiation damage of low-dose exposure and internal exposure, but radiation damage from these kinds of exposure actually exist. Humanity still lacks sufficient knowledge and technology to control radiation. Not only that, we have not determined the extent of impacts on human health from low-dose internal exposure, or its mechanism.

The Fukushima nuclear accident provided an opportunity to fundamentally reconsider the relationship between nuclear energy and human society because it reconfirmed that nuclear energy could get out of control not only due to an intentional explosion by someone, but also by belief in the mythology of safety, human error, an unusually huge natural disaster, social upheaval, or other causes, and inflict severe damage on people and the environment.

Additionally, we must keep in mind that the use of nuclear energy is inherently dangerous from the mining of uranium ore, through its refining, enrichment, and use, and until the fuel is spent.

8. Conclusion

In light of these characteristics of nuclear energy, the government should change its nuclear policy, but no such initiatives are underway because the government intends to continue its policy of reliance on nuclear energy. This is because the government's policy calls for guaranteeing the nation's security with nuclear weapons, and for using nuclear energy as a base-load power source.

Those of us who know the Hibakusha and their demands share the proposition that nuclear weapons and humanity cannot coexist. We must part ways with this hellfire.

Humanity has accumulated the potential energy that will destroy the underpinning of our own survival. Saying farewell to nuclear is the surest way to suppress the emergence of this energy of doom.

We must be victorious in our struggle against governments which depend on nuclear energy, and against the forces which support them. For the future of human society, we must overcome the rule of power and the rule of money, and firmly establish the rule of law.



About Us

Japan Association of Lawyers Against Nuclear Arms (JALANA) is a lawyers' organization whose purposes are abolition of nuclear weapons and nuclear energy, and support for the Hibakusha (A-Bomb survivors). It is also Japanese affiliate of the International Association of Lawyers Against Nuclear Arms (IALANA), which has consultative status with the UN.

JALANA consists of about 300 members who are convinced that Japanese lawyers have special imperative of eliminating all nuclear arsenals. The reason why we must abolish nuclear weapons is their illegality and inhumanity. As jurists of the country that actually suffered nuclear attacks, we must demonstrate their illegality and inhumanity in order to establish a world free of nuclear weapons.

JALANA organizes events on nuclear disarmament, and issues journals "*Hankaku horitsuka*" (meaning "Lawyers Against Nuclear Arms") four times a year that cover reports on our activities and analyses and opinions on current issues related to nuclear weapons.

For more information, please visit our website: <http://www.hankaku-j.org/>



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