

What the Shimoda Case Achieved and Its Contemporary Significance

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Introduction

On December 7, 1963, the Tokyo District Court judged that the use of the A-bomb on Hiroshima and Nagasaki by the US military was in violation of international law. This was the first time in history that an organ of the judicial branch had judged the use of nuclear weapons to be illegal. This trial became known as the Shimoda Case* by taking the name of one of the plaintiffs, Ryuichi SHIMODA. This year (2013) marks the 50th anniversary of this historic judgment and I would like to consider here a reconfirmation of the final conclusion of the Shimoda Case and its contemporary significance.

The person who thought of pursuing legal liability for the use of the A-bomb was the lawyer Shoichi OKAMOTO of the Osaka Bar Association. The catalyst for this goes back to the Tokyo War Crimes Tribunal, in which the allied powers pursued the liability of the Japanese leaders for acts carried out during the Second World War. The lawyer Mr. Okamoto, who served as lawyer for Lieutenant General Akira MUTOH, felt a strong resentment at the time due to the fact that liability for serious violations of international law by the allied powers was not questioned for the reason that they had been the victors. Following the conclusion of the peace treaty, Mr. Okamoto decided to submit a civil lawsuit in the domestic court of the United States with the US government and President Truman as the defendants.

Mr. Okamoto sought the cooperation of the legal profession in the United States, but received a very cold reply. As the next best move, Mr. Okamoto decided to submit a civil lawsuit claiming that the Japanese government was indirectly liable for the US use of the A-bomb to the domestic Japanese court with the Japanese government as defendant. In other words, since the use of the A-bomb on Hiroshima and Nagasaki was in violation of international law, victims of the atomic bombing, the plaintiff in this case, had the right of claim to damage reparations from the United States government. However, since the Japanese government, the defendant, had forfeited the right of claim under Article 19 (a) of the San Francisco Peace Treaty, the plaintiff argued that the defendant was obligated to make damage reparations.

The lawyers Mr. Okamoto and Mr. Yasuhiro MATSUI, who was from Hiroshima and who would later become the Chairman of the Japan Association of Lawyers Against Nuclear Arms, acted as proxies for the case. In the trial, there was almost

no contention concerning the circumstances of the suffering due to the A-bomb, but much time was spent in problems of the interpretation of laws. What was surprising was that the defendant, the Japanese government, claimed that the use of the A-bomb on Hiroshima and Nagasaki was legal.

After roughly eight and a half years had passed since the initiation of the trial in April 1955, the Tokyo District Court found that the use of the A-bomb was a violation of international law. However, the court did not recognize the plaintiff's right to claim reparations for damage, and the claim itself was dismissed. The Japanese judicial system has adopted the three-tiered judicial system, and so it was possible for both the plaintiff and the defendant to appeal for a ruling from a higher court. The plaintiff, however, evaluated the fact that the illegality of the use of the A-bomb had been recognized and decided to forgo the appeal. The defendant, while expressing dissatisfaction with the result, also decided not to appeal, since the court's failure to recognize the right of claim for reparations was a formal victory for the defendant. As a result, the judgment of first instance became the final settlement. Further, the Act on Special Measures concerning Hibakusya was enacted in 1968 due to the momentum created by the Shimoda Case, and can be said to be one of the outcomes of the trial.

What the judgment in the Shimoda Case achieved

(1) The application of international law to new weapons

Since the A-bomb was a new weapon at the time it was used, there was no international law that clearly interdicted its use. However, that did not mean necessarily that the use of new weapons was legal. The verdict found that even if a weapon was new, existing international law (international customary laws and treaties) and "principles of international law which are the basis of the above-mentioned positive international laws and regulations" may be applied.

(2) "The prohibition of indiscriminate attacks"

The judgment performed a legal evaluation of the use of the A-bomb on Hiroshima and Nagasaki from the viewpoint of the "prohibition of indiscriminate attacks," one of the basic principles of the regulations on warfare. Firstly, the content of international customary law that was applied, *"Thus, we can say that it is a long-standing, generally recognized principle in international law respecting air raids, that indiscriminate aerial bombardment is not permitted on an undefended city and that only aerial bombardment on military objective is permitted"* was clarified. The court then evaluated the use of the A-bomb by the US as follows:

"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."

It was in this way that the Shimoda Case Judgment found that the use of the A-bomb on Hiroshima and Nagasaki by the US military was a violation of international law. What should be kept in mind here is that the verdict did not find that the A-bomb itself was an illegal weapon, but that the use of the A-bomb against the undefended cities of Hiroshima and Nagasaki was illegal.

(3) "The prohibition of unnecessary suffering"

In addition, the judgment performed a legal evaluation from the viewpoint of the "prohibition of unnecessary suffering," one of the basic principles of the regulations on warfare. Firstly, it was confirmed that the use of weapons "that cause unnecessary and inhumane suffering" are prohibited under international customary laws. Further, the judgment stated that "we can safely see that besides poison, poison-gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law." Having clarified the provisions of law to be applied, the court evaluated the issue as follows.

"It is a deeply sorrowful reality that the atomic bombing on both cities of Hiroshima and Nagasaki took the lives of many civilians, and that among the survivors there are people whose lives are still imperilled owing to the radial rays, even today 18 years later. In this sense, *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 that unnecessary pain must not be given.*"

The Shimoda Case Judgment thus held that the use of the A-bomb also violated the principle of the "prohibition of unnecessary suffering." However, this principle in the end only applies to combatants, the inflicting of damage on non-combatants itself being prohibited.

The Contemporary Significance

Since this year marks the 50th anniversary of the Shimoda Case Judgment, I would like to consider its contemporary significance. Firstly, the advisory opinion of the International Court of Justice of 1996 adopted almost the same framework as

the judgment in the Shimoda Case regarding the provisions of law to be applied. We can say that through the adoption of an almost identical framework in the two judicial judgments the framework for judging the illegality of the use of nuclear weapons became more robust.

Further, since the use of the A-bomb in August 1945, international humanitarian law, though still insufficient, has achieved some progress. We now have the Geneva Conventions of 1949, the 1977 Protocols Additional to the Geneva Conventions, the Rome Statute of the International Criminal Court, and others. The provisions of the law applied in the Shimoda Case Judgment have now become a little outdated.

However, the most important characteristic of this trial is that specific events were the object of the judgment. The present day cities of Hiroshima and Nagasaki have achieved recovery, and the objects that indicate the damage done by the A-bomb are preserved as monuments. Many of the Hibakusha who survived the A-bomb have also passed away. This indicates that the ability of the evidence substantiating the damage done by the A-bomb or the essence of the A-bomb itself has faded.

The Shimoda Case Judgment held that "The atomic bomb... has characteristics different from all kinds of weapons of the past in that it inflicts on the human body various kinds of pain and bad influences. We must say that the atomic bomb is a really cruel weapon." We can call the A-bomb a "cruel weapon," but in order to have it pronounced as a cruel weapon by judicial judgment requires sufficient evidence. Today, nearly 70 years since the use of the A-bomb, it is extremely difficult to amass that evidence. The fact that the Shimoda Case Judgment based its legal evaluation of the essence of the A-bomb on the testimony of Hibakusha means that its significance should never diminish. And we pray that it will never diminish.

* An English translation of the verdict is available on the website of the International Committee of the Red Cross:

<http://www.icrc.org/ihl-nat.nsf/276c23458e6a0d2441256486004ad099/aa559087dbcf1af5c1256a1c0029f14d!OpenDocument>

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