PART I

# International Law and World Order

# 1

# The *Shimoda* Case

## *A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*

In May of 1955 five individuals instituted a legal action against the Japanese government to recover damages for injuries allegedly sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki in the closing days of World War II. On December 7, 1963, the twenty-second anniversary of the surprise attack by Japan upon Pearl Harbor, the District Court of Tokyo delivered its lengthy decision in the case. The decision has been translated into English and reprinted in full in *The Japanese Annual of International Law for 1964*.[1] This enables an accounting of this singular attempt by a court of law to wrestle with the special legal problems arising from recourse to atomic warfare.

The Japanese court reached the principal conclusion that the United States had violated international law by dropping atom bombs on Hiroshima and Nagasaki. It also concluded, however, that these claimants had no legal basis for recovering damages from the Japanese government. Both sides in the litigation refrained from exercising their right of appeal to a higher Japanese court. Apparently, the five plaintiffs, although disappointed by the rejection of their claim for compensation, were satisfied enough by the finding of the court that the attacks themselves were illegal to let the litigation lapse, and the defendant Japanese government, although unpersuaded by the finding that the attacks were illegal, was willing to forego an appeal in view of the rejection by the court of the damage claim.[2]

The *Shimoda* case seems eminently worthy of attention by international lawyers for a series of reasons. First, it is the one and only attempt by a court to assess the legality of atomic, and, by extension, nuclear weapons. The decision thus offers a focus for a more general inquiry into the continuing relevance of the laws of war to the conduct of warfare in the nuclear age.[3] Second, the case is an illustration of an

[1] Pp. 212–252 (cited hereinafter by page reference alone); digested in *American Journal of International Law* 58 (1964), 1016.

[2] This explanation has been given to me by Yuichi Takano, Professor of International Law, in the course of a correspondence about the case. Professor Takano served as one of three experts on international law appointed by the court in the *Shimoda* case.

[3] The need for a revival of interest in the international law of war has been stressed by several authors, but by none more insistently than Josef Kunz. See, in particular, his "The Chaotic Status of the Laws of

attempt by a court in a country defeated in war to appraise the legality of a major belligerent policy pursued by the victor. Third, the Japanese locus of the litigation gives us an unusual example of an Asian court taking for granted the validity and applicability of a body of international law developed by Western countries, although Japan, it should be noted, is not a newly independent Asian country, nor one that has joined in the attack upon traditional international law. Fourth, the decision grapples with the problem of determining the extent to which individuals may assert legal rights on their own behalf for causes of action arising out of violations of international law. Fifth, the decision discusses the extent to which principles of sovereign immunity continue to bar claims by individuals against governments. Sixth, the decision considers the legal effect of a waiver in a peace treaty of the claims of nationals against a foreign country. Seventh, the court confronts a rather difficult question of choice of laws because of the need to decide whether the existence of the right of recovery is to be determined by Japanese or by US law. And eighth, the whole nature of the undertaking by this Japanese court raises the problem of identifying the appropriate role for a domestic court in this kind of international law case. As such it provides a new setting within which to continue the discussion of some of the more general questions present in the *Sabbatino* controversy.[4] This range of issues is part of the explanation for commending the *Shimoda* case for study by international lawyers. However, it is not possible here to deal equally with all of these points of interest. It is my intention to emphasize only that portion of *Shimoda* concerned with the legality of atomic warfare, although these other elements of the decision will be described as part of the effort to give the reader a complete narration of the case in the first part of the article.[5]

## 1.1 NARRATION OF THE JUDGMENT IN THE *SHIMODA* CASE

In narrating *Shimoda* I shall adhere rather closely to the plan of organization used in the decision itself. Thus I will begin by summarizing the contentions of the opposing litigants and follow this with a description of the reasoning used by the Tokyo District Court to reach the various conclusions that together form the judgment in the case.

War and the Urgent Necessity for Their Revision," *American Journal of International Law* 45 (1951), 37–61.

4 *Banco Nacional de Cuba* v. *Sabbatino*, 376 US 398 (1964); for some depiction of these issues see Richard A. Falk, "The Complexity of Sabbatino," *American Journal of International Law* 58 (1964), 935–951.

5 At present, the only available English translation of the opinion is to be found in the Japanese Annual. This periodical is often difficult to obtain. Besides, the reported version of *Shimoda* contains many passages that are rather obscure. It is on this basis that such a long explication of the case is offered here.

**The Argument of the Five Plaintiffs.** The plaintiffs sought recovery for the injuries that they had sustained either to their person or to members of their immediate families.[6] The amounts sought were in four cases 200,000 yen and in one, that of *Shimoda*, 300,000 yen, plus 5 percent measured from the initiation of the suit on May 24, 1955.[7] The costs of the litigation, regardless of outcome, were to be borne by the plaintiffs.

The plaintiffs begin by describing the atomic attacks and their effects upon the cities of Hiroshima and Nagasaki. The description is detailed and emotional. For example, "People in rags of hanging skin wandered about and lamented aloud among dead bodies. It was an extremely sad sight beyond the description of a burning hell, and beyond all imagination of anything heretofore known in human history" (p. 214). The relevance of this description is to establish the claim that the atomic bomb caused such indiscriminate suffering and such unusually severe and grotesque pain as to violate rules governing the permissible limits of warfare.

In fact, the plaintiffs contend that the use of atomic bombs against these Japanese cities violated both conventional and customary international law. To avoid duplication of discussion, a detailed consideration of these contentions must await the description of the court's reasoning. In the main, the claims were based upon the series of formal international acts prohibiting recourse to poisonous gas, restricting rights of aerial bombardment, buttressed by the more general condemnation of terror tactics that inflict indiscriminate injury and unnecessary suffering upon civilians. The principal argument is that the atomic attacks are covered by these preatomic legal instruments either directly or *mutatis mutandis*, and furthermore, that even if it is found that positive international law does not directly condemn these atomic bombings, these rules indirectly or rather "their spirit must be said to have the effect of natural law or logical international law" (p. 216), and by this process support a finding of illegality.

It was also pointed out that the destructive power of these atomic bombs was such that it caused indiscriminate casualties, without distinguishing between combatant and noncombatant within the area of a circle having a radius of four kilometers as measured from the epicenter of the blast, and furthermore, that this effect was known to those who ordered its use. The pain caused, it is alleged, is far more severe than that resulting from weapons that had been previously outlawed as agents of extreme suffering for the victim, such as poisonous gas or dumdum bullets. The

[6] The description of the injuries is itself a very dramatic aspect of the *Shimoda* opinion and serves to make it one of the prime documents of war in the atomic age. Each of the plaintiffs is a survivor of the attacks and suffers from a variety of grotesque disabilities. As well, the family of each claimant was either completely wiped out or maimed; this, too, is described in detail. I have tried to assess the nonlegal importance of the case in a short article, Richard A. Falk, "The Claimants of Hiroshima," *Nation*, Feb. 15, 1965, 157–161.

[7] The exchange rate is about 360 yen for one US dollar. The recoveries sought, then, were for rather modest amounts.

argument is also made by the plaintiffs that, since Japan was obviously on the brink of defeat and had no war potential left, the only purpose of the attacks was "as a terrorizing measure intended to make officials and people of Japan lose their fighting spirit" (p. 217). The plaintiffs also point to the diplomatic protest based on international law issued by the Japanese government immediately after the attacks, on August 10, 1945. Finally, they suggest that if a weapon is permissible until explicitly prohibited, then a belligerent is entitled to act as "a Merchant of Death, or a Politician of Death" (p. 217).

The next link in the chain of accusation is to allege that what is illegal in international law is also illegal under municipal or domestic law. The plaintiffs also allege that to claim damages a suit could, in theory, be filed in a District Court of the United States against former President Truman and the United States, the parties they charge as responsible for the atomic attacks. And, if this is hypothesized, then the conflicts rules of the court in the United States would apply and would determine that the controversy should be governed by Japanese law, as Japan was the place where both the illegal acts and the injury occurred. The statement in the opinion is not very clear at this point, but the claim being made is that the United States is the real defendant and that, if the case is looked upon in that way, the controversy is governed by international law as it is received by Japanese municipal law. When this is done, then the claim is made by the complainants that under Japanese law the state is responsible for the illegal acts of its officials and that the officials who acted are likewise responsible. The strategy of the complaint is evidently to circumvent the defenses that the presentation of the claim is barred because the acts complained about are non-reviewable acts of state or that the defendants are immune from suit as a consequence of the doctrine of sovereign immunity. Here also, the presentation of the plaintiffs seems unclear, and appears limited to brushing aside these defenses on the ground that such technicalities cannot possibly apply to a calamity on the scale of an atomic attack.

The next step, and a difficult one for the plaintiffs, is to show a basis for recovery by these private individuals. The problem is so formidable because of the governing notion that states are alone entitled to pursue claims arising out of violations of international law, and that individuals have, as a consequence, no cause of action or standing to complain about a violation of international law. The plaintiffs point to Article 19(a) of the Peace Treaty between the Allied Powers and Japan by which "Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of action taken because of the existence of the war," as presupposing the existence of claims against the victors by individual Japanese. If there was nothing to claim, the complaint reasons, then there was no need to waive. And, further, the allegation is made that these rights of individuals are directly available to them and did not depend for assertion upon their adoption by the government of the claimant. The argument here grows a bit abstract and fragmentary, but it seems that the plaintiffs want to suggest that if the victor is able

to bar claims by individuals arising in the defeated country through the device of a waiver clause in the Peace Treaty, then there is no constraint whatsoever upon the belligerent policies of the side that wins a war.

The complaint also tries to demonstrate why a Japanese domestic court is the only appropriate forum for the litigation. The plaintiffs argue that the waiver in Article 19(a), because treaties are the supreme law of the land, would be effective to bar the presentation of the claim in a US court, so that their only remedy is to proceed in Japan. The statement goes on, somewhat gratuitously, to say that if the plaintiffs did institute the action in the United States, they could not "easily obtain the cooperation of lawyers or the support of public opinion," adding that even in Japan "it is extremely difficult to find cooperators" (p. 220).

The final step of the argument in the complaint is to show that the government of Japan wrongfully waived the claims of its nationals, and as a consequence, is responsible for the losses thereby inflicted. This position depends on a complicated process of analysis. First, the assertion is made that the inclusion of Article 19(a) in the Peace Treaty was an illegal exercise of public power under Japanese law and that Article 1 of the State Compensation Law of Japan makes the Japanese government responsible for losses suffered by Japanese nationals if these losses result from illegal exercises of public power.[8] Second, the United States must have given certain benefits to Japan in exchange for this waiver provision, especially as it applied to responsibility for the atomic attacks. This means, in effect, that the Japanese government was enriched as a result of the expropriation of private property (the causes of action of claimants like these plaintiffs) without paying just compensation as required by Article 29 of the Japanese Constitution.[9] Furthermore, even if the plaintiffs do not benefit directly from this clause in the Constitution, nevertheless the waiver imposes on the Japanese government a legal obligation to compensate. The reasoning of the complaint here is not made entirely plain. The obligation of the government does not depend, as the defense contends, upon a specific law of expropriation, but arises from any governmental act that effectively expropriates and from the basic values of respect for private property and for human rights that are protected generally throughout the Japanese Constitution. The plaintiffs also suggest that the obligation to compensate arises from the illegal acts giving rise to the injury, and thus does not depend upon the discretion of the state to enact legislation for the relief of war victims. Here, the argument seeks to maintain

[8] Art. 1: (1) If an official or servant of the state or a public body intentionally or negligently commits an unlawful act and injures another in the course of performing his duties, the state or public body is liable to make compensation therefor. (2) In the case of the preceding paragraph, if there has been intent or gross negligence, the state or the public body may claim compensation from the official or servant involved. (Kokka Baisho Ho, Law No. 125, Oct. 27, 1947)

[9] Art. 29: (1) The right to own or to hold property is inviolable. (2) Property rights shall be defined by law, in conformity with the public welfare. (3) Private property may be taken for public use upon just compensation therefore. (Nihon Koku Kempo, Nov. 3, 1947)

that compensation is a nondiscretionary legal question, and not a political question as the defense contends.

It is on this basis that the responsibility of the Japanese government is alleged to exist. The main steps in the argument are as follows, to recapitulate:

1. The use of the atomic bomb by the United States violated international law.
2. A violation of international law is necessarily a violation of municipal law.
3. The municipal law of Japan governs the controversy before the court.
4. Individuals are entitled on their own behalf to assert claims for injuries arising from violations of international law.
5. The waiver in Article 19(a) of the Peace Treaty bars claiming directly against the US government.
6. The Japanese government violated the constitutional and vested rights of these claimants by agreeing to the waiver provision and is legally responsible for paying the claims wrongfully waived.

**The Defense of the Japanese Government.** To avoid repetition, the position of the defense will be stated as briefly as possible. This does not imply that the arguments are not well made, but only, as might be expected, that the defense devotes much of its presentation to denying the legal conclusions alleged by the plaintiffs. The objective of this section, it should be recalled, is to indicate the structure of the argument between the litigants as a background for an analysis of the decision itself.

The defense concedes, of course, the facts of the atomic attacks, although it submits that the casualties were considerably lower than the plaintiffs contend. On the main issue of legality, the Japanese government contends that the atomic bombs were new inventions and hence not covered by either the customary or the conventional rules of the international law of war. Since the use of atomic bombs was not expressly forbidden by international law, there is no legal basis upon which to object to their use by a belligerent.

But the Japanese government concedes that the legality of use may be determined by the more general principles of international law governing belligerent conduct. But this source of limitation is not very relevant, it turns out, for the defense argues that

> From the viewpoint of international law, war is originally the condition in which a country is allowed to exercise all means deemed necessary to cause the enemy to surrender. (p. 225)

In fact, the defense goes so far in the direction of *Kriegsraison* as to assert that

> Since the Middle Ages, belligerents, in international law, have been permitted to choose the means of injuring the enemy in order to attain the special purpose of war, subject to certain conditions imposed by international customary law and treaties adapted to the times. (pp. 225–226)

This seems to suggest that if there is no explicit prohibition of a weapon, then there is no added inhibition placed in the way of a belligerent by international law.[10]

The defense goes on, after pausing to express its regret about the large number of casualties at Hiroshima and Nagasaki, to vindicate the atomic bombings because they tended to hasten the end of the war, and thereby reduce the net number of casualties on both sides and achieve the belligerent objective of unconditional surrender. It is significant that the Japanese government is willing to associate itself, even for purposes of defense in this action for compensation, with the official justification of the use of atomic weapons that has been offered by the United States.[11] The defense goes so far as to say: "with the atomic bombing of Hiroshima and Nagasaki, *as a direct result*, Japan ceased further resistance and accepted the Potsdam Declaration" (p. 226).[12] The Japanese government takes note of the diplomatic protest registered by Japan at the time of the atomic attacks,[13] but discounts its relevance, by observing that, "taking an objective view, apart from the position of a belligerent," it is not possible "to draw the same conclusion today" as to the illegality of the atomic bombing (p. 226).

Even if international law covers the atomic bombing, there is no cause of action, the defense contends, created in municipal law. The law of war is a matter of state-to-state relations and there is no expectation that individuals injured by a violation of the laws of war can recover directly or indirectly from the guilty government. The defense then considers the outcome of this litigation if it is treated as though it is brought against the United States in a US domestic court. And as courts in the United States refrain from questioning the legality of belligerent acts undertaken by the executive to carry on a war, they would refuse to examine the legality of the use of atomic bombs against Japan. The defense suggests that this judicial restraint in the

[10] The range of issues considered in *Shimoda* is very well anticipated in two articles by William V. O'Brien. See "The Meaning of Military Necessity in International Law," *Yearbook of World Polity* 1 (1957), 109–176; and "Legitimate Military Necessity in Nuclear War," *Yearbook of World Polity* 2 (1960), 35–120.

[11] E.g., Henry L. Stimson, "The Decision to Use the Atomic Bomb," *Harper's*, Feb. 1947, 97–107; Harry S. Truman, *Memoirs by Harry S. Truman, Vol. 1: Year of Decisions*, Garden City, NY: Doubleday (1955), 419–420.

[12] The documents connected with the Japanese surrender, including the Potsdam Proclamation [not Declaration], are conveniently collected. Robert J. C. Butow, *Japan's Decision to Surrender*, Stanford, CA: Stanford University Press (1954), 241–250; see also Occupation of Japan (US State Dept.), 51–64.

[13] The Japanese government filed a diplomatic protest against the bombing of Hiroshima by submitting a formal note to the United States by way of the Swiss government on Aug. 10, 1945. The principal grounds relied upon in the protest were that the atomic bomb caused indiscriminate suffering and produced unnecessary pain, and, as such, violated the principles set forth in the Annex to the Hague Convention respecting the Laws and Customs of War on Land, Arts. 22 and 23(e) of the Regulations respecting the Laws and Customs of War on Land. This appeal to law was supplemented by a general appeal to elementary standards of civilization prohibiting recourse to methods of warfare that cause civilians great damage, and damage to such immune objects as hospitals, shrines, temples, and schools. In fact, the diplomatic note calls the atomic bombing "a new offense against the civilization of mankind."

United States "necessarily results from the theory called Act of State" (p. 227).[14] At the time of the attacks, furthermore, sovereign immunity would bar, under the municipal law of the United States, claims of this sort being brought against either the US government or the public official responsible for the alleged wrongdoing. And finally, there is a somewhat abrupt assertion that "it is not possible to establish a tort under Japanese law by applying the conflict of law rules of the United States" (p. 227). This evidently refers back to the plaintiffs' argument that, since the illegal acts took place in Japan, the conflict rules in effect in the United States would lead the law of Japan to apply, and, by reference to Japanese law, public officials are responsible to individuals for the wrongs that they do in their official capacity. But, says the defense, the *lex fori* would bar reference to foreign law if the claim itself was not admissible because of the immunity of the government and its officials. This means that, if the action is thought of, as it must be (because it is the United States that dropped the bombs, that did the alleged wrong),[15] as instituted in the United States, then one never reaches the choice-of-law stage because the claim is barred at the prior stage at which the nonsusceptibility of the defendant to suit requires the court to dismiss.[16]

The Japanese government also denies the standing of the claimants to institute action on their own behalf. The defense subscribes to the traditional theory that it is the government on behalf of national victims, and only the government, that has the capacity, in the absence of a treaty conferring capacity on individuals, to assert claims against a foreign state. And in line with this approach, the defense argues that the government asserts the claim "as its own right" and determines "by its own authority" how to distribute the funds recovered because of an injury to its nationals (p. 228). The defense also argues that, even if somehow one assumes that the plaintiffs possessed an abstract legal right, there exists no procedure by which it can be realized. For, the defense submits, it is essential to engage, first, in international diplomatic negotiations and then, if negotiations fail, to proceed to the International Court of Justice.[17] The plaintiffs are in a position to do neither and,

[14] This usage of "act of state" suggests that US courts will not question the validity of official acts performed by their own Executive. In actual fact in US practice, the term "act of state" is only used in litigation that questions the validity of an official act of a foreign government. However, *Shimoda* is correct in terms of results, if not in terms of doctrinal explanation. For a leading US case dealing with internal deference, see *United States* v. *Curtiss–Wright Export Co.*, 299 US 304 (1936); cf. also *Hooper* v. *United States*, 22 Ct. Cl. 408 (1887).

[15] But recall that the plaintiffs do advance the theory that the wrongful waiver in Art. 19(a) of the Peace Treaty makes Japan an independent wrongdoer.

[16] The plaintiffs' submission on this point is quite obscure, as reported. See numbered par. 4 on p. 227, and my interpretation at the start of this section [Section 1.1].

[17] This view by the defense of the procedure for pursuing international claims seems rather rigid, especially as far as the need for recourse to the International Court of Justice is concerned. There are many other decision-makers used in international society for the settlement of international claims. See generally Richard B. Lillich and Gordon A. Christenson, *International Claims: Their Preparation and Presentation*, Syracuse, NY: Syracuse University Press (1962).