THE SHIMODA CASE: A LEGAL APPRAISAL OF THE ATOMIC ATTACKS UPON HIROSHIMA AND NAGASAKI

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Of the Board of Editors

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 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

[1] Pp. 212–252 [cited hereinafter by page reference alone]; digested in 58 A.J.I.L. 1016 (1964).

[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 War and the Urgent Necessity for their Revision," 45 A.J.I.L. 37 (1951).

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 United States law. And eighth, the whole nature of the undertaking by this Japanese court raises the problem of identifying the appropriate rôle for a domestic court in this kind of an 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]

I. A 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.

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% measured

[4] Banco Nacional de Cuba *v.* Sabbatino, 376 U. S. 398 (1964); for some depiction of these issues see Falk, "The Complexity of Sabbatino," 58 A.J.I.L. 935 (1964).

[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.

[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 non-legal importance of the case in a short article, "The Claimants of Hiroshima," The Nation, Feb. 15, 1965, pp. 157–161.

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 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 pre-atomic 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 dum-dum bullets. The argument is also made by the plaintiff 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, 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

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

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 plaintiff 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 plaintiff, 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 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 United States 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 that compensation is a non-discretionary 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.

[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 therefor. (*Nihon Koku Kempo,* Nov. 3, 1947.)

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 United States Government.

6. The Japanese Government violated the constiutional 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

[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," 1 Yearbook of World Polity 109 (1957); and "Legitimate Military Necessity in Nuclear War," 2 *ibid.* 35 (1960) (this second article is hereinafter referred to as O'Brien).

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 an American 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 United States "necessarily results from the theory called Act of State" (p. 227).[14] At the time of

[11] *E.g.,* Stimson, "The Decision to Use the Atomic Bomb," 194 Harper's Magazine 97 (1947); 1 Truman, Memoirs—Year of Decisions 419–420 (1955).

[12] The documents connected with the Japanese surrender, including the Potsdam Proclamation [not Declaration] are conveniently collected. Butow, Japan's Decision to Surrender 241–250 (1959); see also Occupation of Japan (U. S. 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 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."

[14] This usage of "act of state" suggests that United States courts will not question the validity of official acts performed by their own Executive. In actual fact in American 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 United States case dealing with internal deference, see United States *v.* Curtiss-Wright Export Co., 299 U. S. 304 (1936); *cf.* also Hooper *v.* United States, 22 Ct. Cl. 408 (1887), note 51 below.

the attacks, furthermore, sovereign immunity would bar, under the municipal law of the United States, claims of this sort being brought against either the United States 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 plaintiff's 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 non-susceptibility 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, therefore, one must view the Peace Treaty as extinguishing their abstract claim (representing, presumably, the results of diplomatic negotiation), even if their legal rights be granted *arguendo* an independent existence prior to that.

On the issue of waiver, the defense suggests that only the claims of Japan as a state were waived by Article 19(a) and that whatever claims were possessed by Japanese nationals in their individual capacity survived

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

[16] The plaintiff's submission on this point is quite obscure, as reported. See numbered par. 4 on p. 227, and my interpretation, pp. 761–762 above.

[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 Lillich and Christenson, International Claims: Their Preparation and Presentation (1962).

intact. The defense points to the absence of an extinction clause (as is included in the Peace Treaty with Italy) in the Peace Treaty with Japan as indicating an intent to exclude the independent claims of individuals from the waiver provision, and even if one construes the waiver as intending to embrace those claims, it is ineffective to do so, as "it amounts to no more than a statement that Japan waived what could not be waived, and the citizens' own claims are not extinguished by the statement" (p. 229).[18] The defense, of course, wants to avoid legal responsibility for a wrongful waiver of its citizens' claims. The argument is complicated and somewhat hard to follow in the form in which it is reported. The defense evidently wants to assert a series of alternative contentions: that there were no legal rights possessed by the plaintiff, but that even if there were legal rights, they were extinguished by the Peace Treaty, and that even if this has the effect of violating Japanese municipal law, there is no illegality or responsibility on the part of the government.

The defense argues that

> If a defeated country cannot conclude a peace treaty, because the peace treaty would be contrary to the prohibition clause of the constitution of the defeated country, or because the legal procedures in the constitution cannot be taken, a defeated country could never conclude peace and consequently it would be required to continue the war as long as the capacity of conduct of war remains. (p. 229.)

This might be best understood as a rather misleading way to contend that the capacity to negotiate peace must take precedence over other normal legal obligations of the Japanese Government and these normal legal obligations must, in turn, be relaxed so as to conform with the exercise of this extraordinary power to negotiate a peace treaty.

The Japanese Government also argues that if, despite these contentions, the waiver in Article 19(a) is construed as a violation of Article 29 of the Japanese Constitution, then there is still no basis for recovery, as the Constitution "does not directly grant the people a concrete claim for compensation" (p. 230). The effect of Article 29 may be to render a law void that takes property without compensating, but it does not by itself confer a right of recovery in the event that the property is actually taken. Apparently, although this is not spelled out, implementing legislation would be needed, according to the defense, to support a claim for recovery.

In concluding its presentation, the defense describes itself as "un-

[18] The defense appears to be making an inconsistent contention in relation to the waiver issue. On the one hand, it wants to maintain that the waiver extinguished whatever rights the plaintiffs might have possessed. On the other, it wants to establish that there were no rights to waive so that the Japanese Government cannot be held accountable for a wrongful exercise of governmental power by agreeing to the waiver. The position is not truly inconsistent, however, as the defense wants, if possible, to show that the waiver issue is irrelevant because there was nothing to waive. However, if the court disagrees, then the defense wants to rely upon the waiver to extinguish the plaintiff's cause of action, even though this risks a finding of responsibility as a result of a wrongful waiver.

stinting in its deep sympathy'' with the survivors of the atomic attacks, but points out that ''the way of consolation for these people must be balanced with the consolation for other general war victims, and by taking into due consideration the actual circumstances of finance of the State, etc.'' (p. 230). These matters of social justice are asserted to be matters of politics, not law, and must therefore, be left for settlement to the wisdom of the legislature; they are not resolvable by exercise of the adjudicative powers of the courts. And until the legislature sees fit to act, the Japanese Government, as such, cannot be said to have an obligation to compensate.

The statement of the defense ends with an admission of ignorance about the circumstances and extent of the damages actually suffered by these plaintiffs, neither admitting nor denying the claims posited.

The Judgment of the Tokyo District Court. The portion of the proceedings that I identify as ''the judgment'' is indicated in the translated excerpt by a single word in bold-face type: REASONS. The court begins with a recital of background material. First, the attacks of August, 1945, on Hiroshima and Nagasaki are described in some detail. The casualties are reported in accord with the more conservative figures submitted by the defense.[19] Second, a brief account of atomic energy is given to establish the basis for considering that these weapons possess tremendous and unprecedented destructive force. Third, a rather extended presentation is made of the varied effects and scope of destruction that are to be expected for atomic bombs having the explosive power of those used in Japan.[20] The most prominent of these effects is the bombshell blast proceeding from the fireball that is created by exploding an atomic bomb in the air and that results in ''a wave of air (wave from bombardment) of high temperature and high pressure'' that ''spreads in all directions quickly'' and ''destroys buildings and other structures as if an earthquake or typhoon occurred'' (p. 232). For Nagasaki this blast effect meant that ''houses within 1.4 miles of the epicenter collapsed, those within 1.6 miles suffered rather heavy damage, and even those at the point of 1.7 miles had their roofs and walls damaged.'' The bombshell blast causes heat rays as a secondary effect: ''These heat rays include ultraviolet rays as well as visible rays and ultrared rays. The heat rays reach the earth at the same speed as light, set fire to inflammable things on earth, burn the skin, and cause man's death according to the conditions'' (p. 232). The court

[19] There is a considerable difference in the casualties reported. The plaintiffs list 260,000 killed at Hiroshima, 73,884 at Nagasaki; similar discrepancies exist for the figures on wounded at each place, the plaintiff contending 156,000 at Hiroshima, 76,796 at Nagasaki, and the defendant 51,408 at Hiroshima, 41,847 at Nagasaki.

[20] The bombs used against Japan had an explosive power approximating 20,000 tons of TNT (20 kilotons), whereas current nuclear warheads in standard weapons systems have an explosive power varying between 1,000,000 and 10,000,000 tons of TNT (1–10 megatons), and some of the nuclear devices that have been tested have an explosive capacity of over 50 megatons. The ratio between the bombs used in World War II and a 50-megaton device is 1: 2500.

concludes that 20% to 30% of the deaths at Hiroshima and Nagasaki were caused by heat rays and that at Nagasaki burns were recorded as far away as 2.5 miles from the epicenter, and finally "the most peculiar effect comes from the first stage of nuclear radial rays and residual radioactivity" (p. 233). These radial rays cause death, disease, and severe injury both at the time of the blast and long afterwards. The court is obviously impressed by the added horror that stems from this atomic effect that spreads the suffering through time and space for an unknown duration and scope and with uncertain consequence. All in all, the opinion concludes that even "a small-scale bomb" like those used against Japan has a "power of destruction" and "terror" that are "so remarkable" as to mean that the atomic bomb "cannot for a moment be compared with bombs of the past" (p. 233). The opinion ends its survey of the effects of atomic bombs with this sentence: "We must say that the atomic bomb is a really cruel weapon" (p. 234).

It is on this basis that the court turns to examine the allegation that these atomic attacks violated international law. At the outset the court narrows the issue before it in a very significant way by observing that

> There is no doubt that, whether or not an atomic bomb having such a character and effect is a weapon which is permitted in international law as a so-called nuclear weapon, is an important and very difficult question in international law. In this case, however, the point at issue is whether the acts of atomic bombing of Hiroshima and Nagasaki by the United States are regarded as illegal by positive international law at that time. Therefore, it is enough to consider this point only. (p. 234.)

On the one hand, this delineation of the issue cannot be emphasized enough; on the other, the analysis adopted by the court to reach its conclusions goes beyond the facts of the attacks in World War II to disclose the unanimous view of the Tokyo District Court on the relevance of international law to the use of atomic or nuclear weapons against any heavily populated center. But certainly in a strict legal sense it is important to govern one's perception of the case in accord with the restrictive conception set forth by the Japanese court. And in this regard, it is well to emphasize that the opinion does not attempt to deal with the legality of atomic weapons as such, but only with the legality of their use against Hiroshima and Nagasaki. This accords with the best traditions of judicial craftsmanship; namely, the narrowing of the dispositive issue to the greatest extent possible. But even here there is an inevitable ambiguity arising from the fact that most of the legal authority found relevant by the court was developed to proscribe or restrict the use of weapons with certain characteristics (*e.g.*, poisons, dum-dum bullets, bacteria) rather than to regulate their use against certain kinds of targets. Thus if the authority is relevant, then its implication, by common sense, extends to the status of atomic or nuclear weapons as such, that is, to the very issue that the court sets aside. These comments are interposed so as to suggest the

complexity attending any interpretation of "the holding" in the *Shimoda* case.[21]

The court starts out by listing the documents comprising that portion of the international law of war deemed relevant to assessing the attacks on Hiroshima and Nagasaki. These documents consist of declarations of international conferences, widely ratified multilateral treaties, and a draft convention. Their subject matter includes specific prohibitions of explosives under 400 grams, dum-dum bullets, projectiles launched from balloons, submarines, poisonous gases, and bacteriological methods of warfare, and such general sets of regulations as the comprehensive codes governing land warfare adopted at The Hague and the Draft Rules of Air Warfare.[22] The court does not differentiate among these sources of legal authority to any very great extent, and certainly does not make any very sharp distinction between binding treaty obligations and declaratory standards never even intended for formal ratification. It acknowledges the distinction with respect to its discussion of the relevance of the Draft Rules of Air Warfare (1923) by suggesting "The Draft Rules of Air Warfare cannot directly be called positive law, since they have not yet become effective as a treaty." But the opinion goes on, without offering documentation, to aver that "international jurists regard the Draft Rules as authoritative" and that some countries even use them to guide the conduct of their armed forces (pp. 237–238). On these grounds the court is able to treat these Draft Rules as constituting customary international law. Such an inference is jurisprudentially significant in view of the absence of formal consent to these rules; but it is also significant that even the consistent pattern of non-adherence to the standards prescribed by the Draft Rules as governing aerial bombardment fails to shake the confidence of the court in the validity of these standards.[23] The invocation of these

[21] Throughout this discussion "atomic" and "nuclear" weapons will be treated alike for purposes of legal analysis. Also, some comments will be made to clarify obscure passages in the decision. The translated version of the decision will be treated as "authoritative" when it results in awkward, and even incorrect, English. The Shimoda opinion contains almost no formal documentation.

[22] The following legal materials are mentioned by the court as relevant to its deliberations: St. Petersburg Declaration (1868), 1 A.J.I.L. Supp. 95 (1907); Hague Convention on the Law and Customs of Land Warfare and Annex of Regulations (1899), Declaration on Expanding Bullets (1899), *ibid.* 129, 155; Hague Convention on the Law and Customs of Land Warfare (1907), 2 A.J.I.L. Supp. 90 (1908); Declaration Prohibiting Aerial Bombardment (1907), *ibid.* 216; Treaty of Five Countries Concerning Submarines and Poisonous Gases (1922), 16 A.J.I.L. Supp. 57 (1922); Draft Rules of Air Warfare (1923), 32 *ibid.* 12 (1938); Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925), 25 *ibid.* 94 (1931). These various legal documents are all to be found in the relevant volumes of Hudson, International Legislation, and in The Hague Conventions and Declarations of 1899 and 1907 (2nd ed., Scott, 1915).

[23] Most authors consider the relevant legal norms to be lapsed as a consequence of persistent violation, even if they are granted a hypothetical existence. See, in particular, McDougal and Feliciano, Law and Minimum World Public Order 640–659 (1961) (hereinafter cited as McDougal-Feliciano); for comprehensive analysis of the relations

Draft Rules also illustrates the facility with which a domestic court can transform declaratory standards into binding legal obligations.[24] The *Shimoda* case suggests that the formal status of a legal standard may not be very critical to its rôle as an authoritative basis for decision.[25] This issue warrants emphasis because it suggests so clearly the method adopted by this court to apply international law.

Having recited the regulatory standards that are most applicable to the case the court expresses what is manifest, that these legal standards developed prior to the development of the atomic bomb and cannot be understood as directly prohibiting its use. The opinion reaffirms the old consensual dictum that what is not forbidden states is permitted in the context of a new weapon: "Of course, it is right that the use of a new weapon is legal, as long as international law does not prohibit it." (p. 235.) But a prohibition need not be direct or express to be applicable. By interpreting the spirit of existing rules or by extending their coverage through analogical reasoning it is possible to say that a new development is embraced within the earlier prohibition. Furthermore, wider principles of international law underlie the specific rules, and, if the use of the new weapon violates these principles, it violates international law without requiring any specific rule.[26] Thus a court is free to conclude that atomic warfare violates international law, at least under certain circumstances, even in the absence of an express prohibition.[27]

The opinion takes up at this point the cynical realist contention that it is "nonsensical" to prohibit a weapon capable of inflicting serious injury on an enemy, as history shows that it will be used in any event (pp. 235–236). The court admits that international practice has often legitimated weapons whose initial appearance occasioned objection and a sense of outrage, but asserts "this is not always true" (p. 236); for example, the decision points out that the prohibitions of dum-dum bullets and poison gas were largely successful in eliminating these weapons from use in war. On this basis the conclusion is reached that "therefore, *we cannot regard a weapon as*

between air war and international law see Spaight, Air Power and War Rights (3rd ed., 1947).

[24] For a discussion of this process of evolving legal standards at the national level out of international declarations, see Schwelb, Human Rights and the International Community (1964).

[25] Such a question is at the root of two recent studies of the lawmaking activities of the political organs of the United Nations. Higgins, The Development of International Law through the Political Organs of the United Nations (1963); Schachter, "The Relation of Law, Politics and Action in the United Nations," 109 Hague Academy Recueil des Cours 165 (1963, II).

[26] These principles include the requirement of necessity attached to a military justification and a concept of proportionality with respect to the ratio between military and non-military destruction. See McDougal-Feliciano, esp. 59–96, 529–671; O'Brien 35–63.

[27] *Cf.* helpful discussion in Tucker, The Law of War and Neutrality at Sea (Vol. 50, International Law Studies, Naval War College) 54–55 (1955) (hereinafter cited as Tucker); *cp.* Schwarzenberger, The Legality of Nuclear Weapons 25–49 (1958); see also Lauterpacht, "The Problem of the Revision of the Law of War," 29 Brit. Yr. Bk. Int. Law 360 (1952).

legal only because it is a new weapon and it is still right that a new weapon must be exposed to the examination of positive international law.'' (p. 236.) [28]

At this stage the court turns to consider the teachings of positive international law relevant to atomic bombing. It first takes account of the traditional distinction between the right to bomb indiscriminately a defended city and the obligation to bomb only military objectives in a city that is undefended. These standards were incorporated in the Hague Regulations.[29] This distinction is relied upon and elaborated in the Draft Rules of Air Warfare. These rules, specifically invoked by the court, restrict the right of aerial bombardment to military objectives as these objectives are enumerated in Article 24(2): ''military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition, or distinctively military supplies, lines of communication or transportation used for military purposes.'' [30] Article 24(3) goes on to declare that ''the bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited''; whereas Article 24(4) allows aerial bombardment if the populated region is near to the operations of land forces and ''there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.'' The court also quotes Article 22 that forbids ''aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants . . .'' (these articles all are quoted on p. 237). The *Shimoda* court concludes rather loosely that these Draft Rules ''prohibit useless aerial bombardment and provide for the principle of the military objective first of all.'' (p. 237.) It is at this point that the opinion tries to argue in favor of the authoritative character of these non-binding rules.[31]

Furthermore, the opinion holds that the rules governing land warfare ''analogically apply since the aerial bombardment is made on land'' (p. 238). Turning then back to the Hague Rules of Land Warfare, the court suggests that a defended city (that is, one legally susceptible to indiscriminate bombing) is ''a city resisting any possible occupation by land forces'' (p. 238). That is, the defended city must be reasonably close to the battle-

[28] It should be observed that there has apparently never been evidence that a belligerent has refrained from using a weapon that might give it a decisive advantage out of deference to a legal prohibition. See, *e.g.*, O'Brien 92; *cf.* also Baxter, ''The Rôle of Law in Modern War,'' 1953 Proceedings, American Society of International Law 90 (hereinafter referred to as Baxter); and see general exposition of this viewpoint in Brodie, Strategy in the Missile Age (1959).

[29] The opinion invokes Art. 25 of the Hague Regulations on the Law of Land Warfare (1907), and Arts. 1 and 2 of the Hague Convention concerning Naval Bombardment (1907), 2 A.J.I.L. Supp. 147 (1908).

[30] The court also quotes Art. 24(1). The text of the Hague Rules of Aerial Warfare is in 32 A.J.I.L. Supp. 12 (1938).

[31] See pp. 770–771 above.

field. Even if the city is defended, the court says, indiscriminate bombing is legal only if it is restricted to an attack upon military objectives, although the opinion concedes that it is inevitable that such an attack will do some damage to noncombatants and to non-military objectives. But what is forbidden, according to the court's reading of customary international law, is an aerial bombardment of an undefended city that is either "directed at a non-military objective" or "without distinction between military objectives and non-military objectives (the so-called blind aerial bombardment)" (p. 238). On this basis, the court recalls that "even such small-scale atomic bombs" as used against Japan release "energy equivalent to a 20,000 TNT bomb" and that this "brings almost the same result as complete destruction of a middle-size city, to say nothing of indiscrimination of military objective and non-military objective" (p. 239). And so the court reasons that

> *the act of atomic bombing an undefended city . . . should be regarded in the same light as a blind aerial bombardment; and it must be said to be a hostile act contrary to international law of the day.* (Original in italics. p. 239.)

From here it is a short step, immediately taken by the court, to conclude that Hiroshima and Nagasaki were undefended cities that suffered the equivalent of blind aerial bombardments in violation of international law. This conclusion is reached, even though the court concedes that there were some military objectives in both cities and that the atomic bombs may have been dropped for the sole purpose of destroying these military objectives.[32]

After pronouncing the illegality of the atomic attack the court pauses to consider whether the concept and practice of total war, especially as it developed in World War II, do not invalidate the underlying principles restricting bombardment to military objectives. The court affirms the survival of the older principles of limitation upon belligerent policy and points to the continuing inviolability of such objects as "schools, churches, temples, shrines, hospitals, and private houses" (p. 239), as evidence that non-military objectives remain protected in modern war. Instead, total war is understood only to extend the concept of war to include the economic processes underlying the war effort, but not to authorize any policy of total obliteration. The court, it must be said, seems somewhat confused on this set of issues. For it enumerates "food, trade" and "human factors like population, man-power, etc." as being within the narrower concept of total war to which it subscribes (p. 240). But it is evident that if people are military objectives, then the attacks on Hiroshima and Nagasaki are legitimate within its own terms. In fairness, although it is nowhere said very explicitly, the court's opinion probably intends only to authorize attacks on those people who are contributing rather directly to the war

[32] The relevant language is italicized by the court: "*. . . 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.*" (p. 239.)

effort, not to people in general. Even this restrictive interpretation is not very satisfactory, however, if activities relating to food and trade are considered to be part of the war effort. It seems evident that once any concessions of this sort are made in the direction of total war, then it is quite difficult to retain the distinction between military and non-military objectives, and without this distinction the central basis of legal condemnation—the indiscriminate character of an atomic attack—is undercut.

The court goes on to say that this reasoning with respect to atomic attacks does not imply that strategic area bombing is a violation of international law, even if the idea of an area or zone is broader than that of military objective. The opinion points out that where military objectives are concentrated, defenses heavy, and camouflage effective, then by bombing a zone "the proportion of the destruction of non-military objective is small in comparison with the large military interests and necessity" (p. 240). But the court stops short of upholding area bombing, saying only that "it cannot say that there is no room for regarding it legal."[33] The *Shimoda* court seems eager here to emphasize the narrow scope of the holding and to avoid resting the opinion on Hiroshima and Nagasaki upon legal reasoning that would also necessarily condemn the non-atomic belligerent policy adopted on both sides throughout World War II.[34] The opinion concludes that the area principle, even if accepted as broadening the scope of a permissible attack on an undefended city, does not alter the legal status of the attacks upon Hiroshima and Nagasaki, as neither city was one in which military objectives were concentrated.

In addition to the law regulating aerial bombardment, there are quite separate grounds, however, the court asserts, for regarding the attacks upon these two Japanese cities as illegal. The court accepts as a principle of international law the duty to refrain from using means of warfare that cause unnecessary suffering, a principle it derives from the "just war" tradition and its expression in the St. Petersburg Declaration of 1868. At the same time the opinion acknowledges that humanitarian considerations must always be balanced against military ones to discover the limits of legitimate warfare. Thus, it is not possible to base a prohibition on the use of atomic bombs directly and uncritically upon the prohibition put upon projectiles under 400 grams in the St. Petersburg Declaration. For these latter weapons did not offer any military advantage comparable to that derived from the atomic bomb. But the court views as more relevant in this regard the prohibitions placed upon poison gas. The language in Article 23(a) of the Hague Regulations respecting Land Warfare, the Declaration prohibiting the use of projectiles the sole object of which is

[33] Consistent with the mode of analysis adopted by the court (see Secs. II and III below), it would not be necessary to condemn or exonerate strategic area bombing *as a whole*, but only to pass judgment upon its *various specific occasions of employment*.

[34] *Cf.* on this Spaight, who upholds the legality of strategic area bombing and challenges the legality of the atomic attacks in Air Power and War Rights 265–281 (3rd ed., 1947), with McDougal-Feliciano 665–666, who regard the strategic area bombing and the atomic attacks as having the same legal footing.

the diffusion of asphyxiating or deleterious gases (1899), and the Geneva Protocol of 1925 prohibiting "the use in war of asphyxiating, poisonous and other gases, and bacteriological weapons" are deemed relevant by the *Shimoda* court.[35] Apparently, although this is not explicit, the prohibition of poison gases is so relevant because, as with atomic weapons, gas is a significant weapon. Note that, as has already been mentioned, the fact that neither Japan nor the United States ratified the Geneva Protocol is not deemed to detract from its authority.[36] The court suggests that "there is not an established theory among international jurists in connection with the difference of poison, poison-gas, bacterium, etc. from atomic bombs" (p. 241). The court then argues that the decisive consideration is whether the weapon causes unnecessary suffering and is cruel in its effects. This depends, it would appear from the analysis, although again this is not spelled out, upon the proportionality of the relationship between military and non-military destruction. Apparently it is on this basis that the court concludes that "it is doubtful whether atomic bombing really had an appropriate military effect at that time and whether it was necessary" (p. 241). And to call attention to the peculiarly cruel effects of the atomic bomb, the opinion refers to radiation sickness that continues to afflict its victims eighteen years after the attack, that is, in 1963. With this, the court formulates one of its several italicized holdings:

> *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.* (pp. 241–242.)

It must be observed that the opinion makes no effort here to examine whether, in fact, the attacks upon Hiroshima and Nagasaki hastened the end of the war and saved lives on both sides.[37] Even if the court had considered these claims relevant and had been persuaded of their accuracy, it might still have concluded as it did by denying the right to seek unconditional surrender by a means that tends to arouse terror, and especially when these means are used to destroy populated cities that contain relatively few, and those insignificant, military targets.

The principal holding of the court is, of course, that the attacks with atomic bombs upon Hiroshima and Nagasaki on August 6 and 9 of 1945

[35] For texts, see documentary sources given in note 22 above.

[36] For reliance upon the relevance of pre-atomic international law, especially by analogy to the prohibition of poison gas, see Singh, Nuclear Weapons and International Law 147–173 (1959); Schwarzenberger, *op. cit.* note 27 above, at 26–38; for skepticism, see McDougal-Feliciano 659–668; Tucker 50–55; O'Brien 88–94; Stone, Legal Controls of International Conflict 547–548 (1954).

[37] The defendant asserted this as part of its argument for the legality of the atomic attacks. One commentator in the United States went so far as to conjecture that these attacks "saved the very national existence of Japan. It may have been a blessing in disguise to the Japanese nation: the Divine Wind that saved Japan from national hari-kiri." Stowell, "The Laws of War and the Atomic Bomb," 39 A.J.I.L. 784 (1945).

were in violation of international law. The principal reasons given were as follows:

(1) International law forbids an indiscriminate or blind attack upon an undefended city; Hiroshima and Nagasaki were undefended; therefore, the attacks were illegal.

(2) International law only permits, if at all, indiscriminate bombing of a defended city if it is justified by military necessity; no military necessity of sufficient magnitude could be demonstrated here; therefore, the attacks were illegal.[38]

(3) International law as it has specifically developed to govern aerial bombardment might be stretched to permit zone or area bombing of an enemy city in which military objectives were concentrated; there was no concentration of military objectives in either Hiroshima or Nagasaki; therefore, no legal basis exists for contending that the atomic attacks might be allowable by analogy to zone bombing, because even the latter is legal, if at all, if directed against an area containing a concentration of military targets.

(4) International law prohibits the use of weapons and belligerent means that produce unnecessary and cruel forms of suffering as illustrated by the prohibition of lethal poisons and bacteria; the atomic bomb causes suffering far more severe and extensive than the prohibited weapons; therefore, it is illegal to use the atomic bomb to realize belligerent objectives:[39]

(a) that is, the duty to refrain from causing unnecessary suffering is a principle of international law by which all belligerent activity is tested, whether specifically regulated or not;
(b) that is, specific prohibitions embody a wider principle and this principle extends to new weapons' developments not foreseen at the time when the specific prohibition was agreed upon.

Having reached these conclusions favorable to the plaintiffs, the opinion goes on to examine whether a Japanese court is able to award compensation to these individuals injured at Hiroshima and Nagasaki. The main issues in this part of the case are as follows:

[38] This second rationale is important because it liberates, to some extent, the Shimoda decision from the archaic distinction between a defended and an undefended city. See Spaight, *op. cit.* note 23, at 261: "Not for a generation or more has the accepted criterion of a place's liability been its being fortified or not. Under the Land War Rules of The Hague (1907, Art. 25) such liability depends on its being *defended;* being defended and being fortified are, of course, not necessarily synonymous. But even the criterion of defence has in its turn become outmoded. A town's immunity rests today on its containing no military objectives. . . ." But see retention of distinction in Art. 621(d) of the current United States manual, Law of Naval Warfare (1955).

[39] There are two contentions here: first, the principles underlying specific rules may be extended to prohibit activity unregulated by specific rules—the principles serve as a sufficient legal criterion by themselves; second, prior specific rules incorporate and exhibit principles, and the rules may be extended to cover analogous situations.

(1) Assuming that there was an injury caused by a violation of international law, is there also a violation of domestic law that can be relied upon by a domestic court as the basis for recovery?

(2) Are the municipal aspects of the case governed by Japanese or United States law?

(3) Can Japan be made responsible for waiving the international claims of its nationals?

(4) Can the United States be made responsible either in a Japanese court or by hypothesizing the outcome in an American court?

The court summarily concludes that, despite the absence of a specific provision in the Imperial Constitution of Japan (in force at the time of the atomic attacks), it was generally understood that a violation of international law, whether customary or treaty, was also a violation of Japanese municipal law. The same legal result, the opinion finds, occurs in the United States, and there treaty law has the benefit of an explicit constitutional provision, Article VI, paragraph 2.[40] Therefore, a violation of international law is *ipso facto* a violation of the domestic law of both Japan and the United States. But, as the opinion notes, the violation of municipal law is of no relevance unless these plaintiffs have the standing to present a claim and the court before which it is brought is competent to adjudicate such a suit on the merits.

The court affirms that when a belligerent injures another belligerent by an illegal act then it is liable to pay damages. But the liability is possessed by the United States and it is discharged by paying Japan. The only proper defendant is the United States and not, as the plaintiffs alternatively contended, the public official who ordered the illegal acts, President Truman. But is there a legal claim possessed by the injured individuals as well as the injured state? The opinion does not endorse the pure form of the traditional view that states, and only states, have the standing to pursue claims arising from violations of international law. The language used in the opinion is not entirely clear, but the court seems to affirm the potential capacity of the individuals to enforce international law. At the same time, the court denies that this capacity always, or even generally, exists in present-day international law. On the contrary, the individual only posseses a legal capacity to proceed on his own when the capacity has been specifically conferred in an international agreement.[41] In the italicized formulation of the court:

> *It is still proper to understand that individuals are not the subject of rights in international law, unless it is concretely recognized by treaties.* . . . (p. 245.)

[40] Art. VI, par. 2, reads in the relevant clause: "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

[41] The court gives some examples of treaties that have conferred procedural capacity upon individuals on p. 244.

The court also discusses the relevance of the legal capacity of a state to assert a legal claim against another state in behalf of a national injured by a violation of international law (the so-called right of diplomatic protection). The plaintiffs contend that individuals have a legal right to insist upon diplomatic protection. The court denies this, affirming the orthodox position that a plaintiff state has full discretion whether to proceed or not, and if it decides not to, its national has neither a claim against its own government nor a secondary or residual right to proceed against the alleged wrongdoer state. That is, a national is completely dependent on the willingness of his government to assert a claim for his benefit in a situation of the kind presented by the injuries done at Hiroshima and Nagasaki. In international law the government recovering on such a claim is not required to give the amount awarded to the injured individuals. The rôle of this argument in the case is not made entirely plain. The court seems to be saying that on an international level state-to-state relations govern both the presentation of the suit and the rights of recovery, and that, therefore, these injured individuals have no independent legal rights.

The court goes on to inquire whether it is possible for these claimants to recover on the basis of a national cause of action in the domestic courts of either Japan or the United States.[42] Recovery on the basis of the wrongs alleged is impossible in a Japanese court, the opinion reasons, because Japan, in common with other countries and in deference to international law, does not allow a foreign country to be a defendant in its courts.[43] The same result follows in the United States as a consequence of the national adoption of the sovereign immunity doctrine allowing the government to be made a defendant only when it has given its consent. At the time of the illegal acts, there was no right to sue the United States Government in United States courts. Even if one gives the plaintiffs the benefit of the Federal Tort Claims Act, enacted after 1945 but before the suit commenced, it would not authorize this claim because it stipulates exceptions for the discretionary duties of administrative organs and for claims based on the hostile acts of land and sea forces or arising in a foreign country.[44] For these reasons claims of the *Shimoda* variety are not allowable in the domestic courts of the United States.

[42] Having considered the availability of an *international* claim, the Tokyo court goes on to inquire whether these claimants might not be able to bring a *national* claim based upon international law in the domestic courts of one or the other country. It is in this context that doctrines of sovereign immunity and act of state bar adjudication.

[43] The Shimoda opinion reasons this way apparently(it is not made explicit) because the court considers that the case, in one sense, is being tried *as if* it were brought against the United States; for without the waiver clause Japan would clearly not be a permissible defendant. Therefore, it is necessary to see whether the plaintiffs would have had a claim in the absence of a waiver so as to determine if anything of value was waived. It is in this respect that it is relevant to assess whether the plaintiff could have proceeded against the United States in either United States or Japanese domestic courts.

[44] *Cf.* Federal Tort Claims Act, 28 U.S.C. §2680; see Note, "The Discretionary Function Exception of the Federal Tort Claims Act," 66 Harvard Law Rev. 488 (1953).

The remaining important issues arise from the waiver of Japan's claims against the United States in Article 19(a) of the Peace Treaty between the Allied Powers and Japan.[45] The court assumes that the waiver did embrace whatever claims were possessed by Japan and its nationals as a consequence of the illegal bombings of Hiroshima and Nagasaki. The claims of Japan that were waived consisted of its rights to assert diplomatic protection, and this, in the court's view, is "an inherent right of the state," the waiver of which would give the plaintiffs nothing to complain about under any circumstances.[46] What is more intricate is the effective waiver of the potential claims of these individuals in their own capacity. It should be remembered that, independently of the waiver, the court expressed the view that there were no causes of action available for individuals to pursue; in the view of the court, then, there was nothing to waive. But, following the canon of completeness of legal reasoning, the court goes on to investigate the proper scope of the waiver as if it mattered. It finds that a government does, by the authority given it under municipal law, have the competence to waive effectively the international claims of its nationals. And the decision concludes that, in fact, Article 19(a) waived "*the claims of Japanese nationals in the municipal laws of Japan and of the Allied Powers, against the Allied Powers and their nationals.*" (Italics in the original, p. 249.) This is the natural meaning of Article 19(a), the unanimous view of the three experts appointed by the court and the position taken by Kumao Nishimura, writing as Director of Treaties Bureau in the Ministry of External Affairs, in an official article-by-article explanation of the Japanese Peace Treaty.[47]

The court also deals with a subtle subsidiary argument of the plaintiffs that the Japanese Peace Treaty must have created rights of Japanese nationals in order to be able to waive them; that is, if no rights existed there was nothing to waive, and there would be then no content for this part of Article 19(a). Therefore the waiver must be taken to admit the legal rights of these claimants to proceed directly under international law. The court denies this, observing that what was waived were the claims of Japanese nationals under the municipal laws of Japan and the Allied Powers.[48]

Is the Japanese Government legally responsible to these plaintiffs for the waiver? Was it a wrongful waiver? First the court points out that "*the claims of international law were not the object of waiver*" (p. 249)

[45] Art. 19(a): "Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese Territory prior to the coming into force of the present Treaty."

[46] There is nothing to complain about because there is nothing lost. Without the waiver the plaintiff would have had no rights arising out of the law governing diplomatic protection.

[47] See p. 249; *cf.* also note 43.

[48] This conclusion reflects the view that the international (state-to-state) claims were not "claims of Japanese nationals" within the meaning of Art. 19(a).

in Article 19(a), there were none;[49] and second, that even those claims that were waived could not, even in the absence of waiver, be pursued in the municipal system of either Japan or the United States as a consequence of sovereign immunity. On this basis it is easy for the court to conclude *"that the plaintiffs had no rights to lose, and accordingly there is no reason for asserting the defendant's legal responsibility therefor"* (p. 250).[50]

The opinion ends with a statement expressing compassion for the victims of atomic attack and looking forward to the abolition of war. The court even ventures to comment upon the non-legal obligations of the Government of Japan to those who suffer from war damage. In its closing paragraph the opinion goes so far as to say: "The defendant State [Japan] caused many Nationals to die, injured them, and drove them to a precarious life by the war which it opened on its own authority and responsibility" (p. 250). The opinion also refers to the "Law respecting medical Treatment and the like for Sufferers of the Atomic Bomb" as being relevant, but on such a small scale that "it cannot possibly be sufficient for the relief and rescue of the sufferers of the atomic bomb" (p. 250). "Needless to say," the opinion states, "the defendant state should take sufficient measures" (p. 250). But this is not something that can be done by a court, but is "a duty which the Diet or legislature or the Cabinet or the Executive must perform." Besides, it is desirable not only to give relief to these complainants but also to the "general sufferers of the atomic bombs; and there lies the *raison d'être* of the legislature and the administration." (p. 250.) Responding rather caustically to the argument of the Japanese Government emphasizing the limits of its financial capability, the decision observes that "It cannot possibly be understood that the above is financially impossible in Japan, which has achieved a high degree of economic growth after the war. We cannot see this suit without regretting the political poverty" (p. 250).[51] This is a rather unusual and direct plea for action by a lower court, although so far as I have been able to ascertain, without result.[52]

The decision ends by dismissing the plaintiffs' claims on the merits, and is signed by the three judges that composed the Tokyo District Court for this case.

[49] This seems confusing. When the court refers to "the claims of international law" in this setting, it means the state-to-state claims, but not the claims that might, but for sovereign immunity, be brought in a domestic court on the basis of international law.

[50] Here, again, some additional comment may avoid confusion. The court construes the waiver as directed at the possibility of claims brought in domestic courts, but considers these potential claims as not giving rise to "rights" because they were foreclosed *ab initio* by the bar of sovereign immunity operative in both the United States and Japan.

[51] *Cf.* analogous argument in the French Spoliation Cases, where individuals contended that the United States Government was liable for the satisfaction of claims waived by treaty. See Hooper *v.* United States, 22 Ct. Cl. 408 (1887). Subsequently, Congress accepted the merit of these contentions and granted relief by statute, just as the court urges in Shimoda. I am grateful to Professor Quincy Wright for calling my attention to this analogy.

[52] This conclusion is based upon my correspondence with Professor Yuichi Takano.

II. The *Shimoda* Case as a Legal Precedent

At best, the process by which authoritative standards of law emerge in international society is a complicated one. This is doubly so for a subject matter that is at once so tinged with human emotion and so centrally connected with the power of the dominant nation-states as is the appropriate legal policy for the governance of nuclear weapons. Comment on *Shimoda* as a legal precedent must be understood as taking place against a background where the whole enterprise of law and order is in issue, where the passions of national sovereignty seem to command so much more allegiance than do appeals in behalf of world order.

At this stage it is, in addition, premature to discuss the relevance of *Shimoda* to an evolving international law of war applicable to the conditions of nuclear warfare. Despite, however, these grounds for caution some tentative remarks seem appropriate. Clearly, for instance, it is wrong to suppose that *Shimoda* by itself gives any answer to such hard questions as whether it is "legal" to resort to nuclear weapons for purposes of self-defense against a non-nuclear armed attack. But given the absence of applicable legal standards, the effort by *Shimoda* to apply the pre-nuclear international law of war to the use of atomic bombs is certainly significant in some respects. For *Shimoda,* at least, is illustrative of how a court might go about appraising a challenged use of nuclear weapons in the future, disclosing some of the kinds of considerations that might be relevant to a legal appraisal. Can we, however, go beyond this and say that, in any sense, legal standards, no matter how restricted, emerged from the holdings in *Shimoda?* Among the limitations of *Shimoda* as a legal precedent is the fact that its holdings are drawn narrowly and that the adjudicating tribunal is a lower court without any particular experience in handling international law cases. These handicaps are offset to some degree by the fact that the *Shimoda* opinion is likely to strike readers as a thorough and impartial analysis of the legal issue raised in the case. Its value as legal authority is further enhanced by the fact that the court's reasoning was heavily influenced by the three reports submitted by experts appointed to advise the court. Each of these experts was a distinguished Japanese professor of international law, fully competent to analyze the legal problems at issue. The agreement among these experts and the court's acceptance of their guidance certainly seem relevant to an appraisal of the authoritativeness of *Shimoda.*

At the same time, it might be easy to detach the case from political reality and exaggerate its importance. By itself, *Shimoda* is unlikely to be taken into account by those entrusted with the formation of military policy in the leading nuclear Powers. One wonders whether even legal advisers to these governments will consider *Shimoda* relevant to their advising functions. But *Shimoda* may be a factor fostering the creation of a world climate of opinion vis-à-vis the use of nuclear weapons that may

eventually insinuate itself into governmental policy-making processes.[53] The extent of this impact will depend, to some degree, upon what "becomes" of *Shimoda,* how and to what extent it is perceived as significant by those with the capacity to shape world opinion in this area.

The subtle and imperceptible influence of attitudes toward legitimacy upon national security policy is difficult to pin down, but nonetheless a potent political reality. It makes little difference whether the United States is formally bound or not by the prohibitions upon the use of poison gas; the vigor of the inhibition arises from the widespread repudiation of poison gas as legitimate, a repudiation so widespread that, if ignored, will undermine support at home and with allies for national policies. Deference to legal standards cannot be fully measured by their technical status as binding or not; the *Shimoda* case itself makes clear that the general acceptance of the standards in the world community is more *legally* relevant than whether they have been introduced into a convention that is binding upon the defendant state.[54]

Shimoda is also important as a formal juridical event that will certainly be asserted as relevant to similar juridical events in the future should they ever occur. Just as the *Eichmann* case was decisively shaped by the Nuremberg Judgment, so, but possibly to a lesser extent, will any subsequent legal appraisal of the use of nuclear weapons be conditioned by *Shimoda.* One side or the other in a legal controversy will undoubtedly find it helpful to their presentation and those given authority to decide will almost certainly take it into explicit account. *Shimoda* also has a potential relevance to current efforts to outlaw nuclear weapons or to prohibit their first use. This matter will be discussed in Section IV.

Shimoda deals with a problematic area in the law of war—the regulation of the means used to wage warfare, and more specifically, the attempt by law to stigmatize certain weapons as impermissible. As Richard Baxter has written: "[r]egulation of the use of weapons is the most difficult problem which the law of war faces and is the type of problem with which it deals least effectively."[55] Baxter explains that

> International law has probably proved to be relatively ineffective in dealing with weapons because a state which has once determined that it must resort to the use of force cannot be persuaded that the law forbids the use of the most effective instruments of force which it has at its disposal.[56]

[53] There seems to be some ground for thinking that world public opinion played a rôle in creating a climate favorable for the negotiation of the Partial Nuclear Test Ban Treaty of 1963.

[54] See pp. 770–772 above for discussion of use by the Tokyo District Court of legal documents almost irrespective of their formal status as binding or not.

[55] Baxter 90.

[56] *Ibid.* at 91; *cf.* O'Brien on the rôle of natural law as a source of constraint that should always take precedence over pragmatic considerations (pp. 100–113); however, note that O'Brien interprets natural law in such a way that "a duty of success, particularly against a Communist attack" (p. 113) figures prominently in the process of identifying the limits of legitimate military necessity.

In fact, Baxter goes so far in articulating the rationale used by those who favor the abandonment of this portion of the international law of war as to say:

> There is so little distinction between the use of force in international relations and the use of weapons through which force is exercised that the two problems are actually one. If the devastation of modern war is to be avoided, it must be accomplished through measures which forbid the unlawful use of force and provide the international community with means of preventing and suppressing it.[57]

The *Shimoda* court expressly and significantly rejects this line of reasoning by saying that international law does not acknowledge the doctrine of "total war," but places strict limits upon what it is permissible for the belligerent to do in order to win. And one of the limits concerns the kinds of weapons that are permissible and another concerns the kind of targets that are permissible. As we have emphasized, the holding is limited to saying that the use of this kind of weapon against this kind of target is impermissible. It is, of course, still quite appropriate for Baxter to regard this as an unpromising area of the international law of war, although such a contention seems to discount the central assumption underlying the idea of mutual deterrence at the strategic level, especially as it is expected to operate in the relations between the United States and the Soviet Union. In effect, there exists a prohibition upon recourse to nuclear weapons backed up by the sanction of threatened retaliation and by the shared objective of avoiding mutual devastation.

But suppose that a given prohibition in the law of war is ineffective in the sense of being frequently violated. To what extent should a court or commentator take considerations of effectiveness into account when pronouncing upon the past or prospective legality of challenged conduct? And it suggests, as well, the further problem as to whether patterns of practice that disregard fundamental legal policies should be understood as a repudiation of the policy rather than as a violation of the law.[58] This consideration is relevant to an interpretation of the argument that strategic area bombing using high explosives during World War II was no worse than the atomic attacks, and if the latter are illegal, then so are the former, despite their prevalence.[59] The *Shimoda* court, as we have seen, refuses to pronounce directly upon the legality of strategic area bombing but expressly rejects the implication that its widespread practice has made

[57] Baxter at 94–95.

[58] Relevant to an assessment of the connection between effectiveness and validity in international law are Tucker, "The Principle of Effectiveness in International Law," in Lipsky (ed.), Law and Politics in the World Community 31–48 (1953) and Falk, "Janus Tormented: The International Law of Internal War," in Rosenau (ed.), International Aspect of Civil Strife (1964); in the context of the legal regulation of nuclear weapons, see Schwarzenberger, *op. cit.* note 27 above, at 57–59.

[59] On the legality of strategic area bombing, see sources cited in note 34; for a useful analysis of strategic bombing in World War II, see Brodie, *op. cit.* note 28 above, at 107–144.

inapplicable or void the traditional legal limits upon the bombardment of inhabited cities.[60]

It is also possible to argue that any weapon can be used in war unless its use is expressly prohibited or regulated by an international convention.[61] This is an application of an approach to obligations in international law that received its purest statement in the majority opinion in the *Lotus* case.[62] Under this reasoning a state is permitted to do whatever is not expressly forbidden by some rule of international law to which it has given its tacit or explicit consent. This is apparently the official position of the United States with respect to the legal status of nuclear weapons, at least as it is expressed in the field manuals issued for the armed services by the Government. For example, Article 613 of the Law of Naval Warfare:

> There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.[63]

The *Shimoda* court cannot be said to constitute directly contradictory authority, although it does to some extent undercut the premise of Article 613 by assimilating atomic weapons into the prohibitions covering poison gas, and by its conclusion that the use of these weapons at least against inhabited cities, which are not places where military objectives are concentrated, amounts to illegal bombing because it is indiscriminate and because it produces terror and unnecessary suffering. But, again, it is important to realize that *Shimoda* is not concerned with the legality of weapons *as such,* but with a specific historic occasion of their use. Because of this restricted concern it is impossible to disentangle which portions of the rationale pertain to the properties of the weapon and which to the target chosen and the historical circumstances (especially, Japan on the brink of defeat) of its use. Certainly it is correct to say, however, that the *Shimoda* court seems opposed to a literal, perhaps an overly restrictive, reading of the *Lotus* opinion or Article 613; according to the opinion, there is no need for an express prohibition to support a finding of illegal use.[64] *Shimoda* expressly refuses to consider a weapon to be automatically

[60] See discussion pp. 773–774 above. [61] See sources cited in note 27 above.

[62] *The Lotus* Case, 1927, P.C.I.J., Ser. A, No. 10.

[63] Law of Naval Warfare (1955); *cp.* Par. 35 of the U. S. Army's Law of Land Warfare: "The use of explosive 'atomic weapons,' whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment."

[64] Art. 613 contains a footnote that says that "the employment, however, of nuclear weapons is subject to the basic principles stated in Section 220 and Article 221." Art. 220 sets out the three basic principles of the law of war—military necessity, humanity, and chivalry—that limit the discretion of belligerents in all circumstances. The footnote also refers the reader to another footnote that forbids the use of any weapon that causes unnecessary suffering or devastation not justified by military necessity. It also refers to Arts. 621 and 622, which limit the right of bombardment. In Art. 621(a), for instance, "the wanton destruction of cities, towns, or villages, or any devastation not justified by military necessity, is prohibited"; and Art. 621(c)

legal just because it is new and not the subject of an express prohibition; even a new weapon may be regulated either by analogy to earlier prohibitions of other weapons or by reference to such guiding principles as those underlying the idea of military necessity.

Shimoda views military necessity in a fairly orthodox way. It refuses to exonerate the bombings because they may have hastened the Japanese decision to surrender and thereby achieved a net saving of lives, even of Japanese civilian lives, although these arguments were presented to the court by the defense and are frequently offered in the West[65] as the principal justification for the atomic attacks. It is a peculiar claim of justification because it depends on such a highly conjectural view of what might have happened in World War II had these atomic bombs not been dropped. If a court accepted evidence on both sides on the relationship between the acceptance by Japan of the Potsdam Proclamation and the atomic bombings, it would still have an issue that was so conjectural as to be virtually incapable of resolution; the causal sequence is too complex (there are too many intervening variables) to permit any fair averment that event X (Hiroshima-Nagasaki) either caused or did not cause event Y (Japan's surrender).[66] Western writers blandly assert the connection and go on to say, in vindication of the attacks, that lives on both sides were saved, because the casualties in the two cities were far lower than would have been the casualties in the event of an invasion of Japan.[67]

As the *Shimoda* court notes, such reasoning, if accepted, would tend to legitimate any belligerent act, however extreme and horrible.[68] Thus the Japanese court rejects the extreme view of a contextual approach to legal valuation that tends to account for any act by reference to an acceptable goal, the surrender of the enemy and the restoration of peace. The relatedness of all experience makes it possible for such an abstract approach to legitimatize virtually all conduct, but the acceptability of the argument would probably vary with the pragmatic consequences of the challenged acts, that is, with whether the belligerent policy succeeded or not. It would seem much easier to make a *prima facie* showing of "military" relevance if there is an eventual victory for the side whose policy is challenged. One danger of the contextual approach is that it

states that "Bombardment for the sole purpose of terrorizing the civilian population is prohibited." Thus the footnote limitations upon Art. 613 might lead one to construe it to be compatible with the decision in Shimoda.

[65] See authorities cited in note 11 above.

[66] For some assessment of the impact of the atomic bombing upon Japan's decision to surrender, see Brodie, *op. cit.* note 28 above, at 138–152, and Butow, Japan's Decision to Surrender (1954).

[67] For the claim that lives were saved see Stimson, "The Decision to Use the Atomic Bomb," 3 Bulletin of Atomic Scientists 37 (1947); Stowell, *loc. cit.* note 37 above.

[68] To accept the approach of the "radical contextualists" is to move international law into virtual harmony with the practice and theory of "total war." The only limitation is that the belligerent policy be undertaken in the good faith expectation that it will somehow weaken the enemy, and thereby contribute to the war effort. And since the enemy's morale is a relevant target for military attack, any tactic, however terroristic, is legitimate.

degenerates into the rationalization of national conduct in legal rhetoric. Whatever our side does is "legal," whatever they do is "illegal." Such an approach tends to undermine the whole structure of reciprocity that underlies the duty to uphold the rules of international law. As soon as the motivation of conduct, as well as conduct itself, enters into the determination of what is legal, the conclusions of legal analysis are almost certainly likely to be self-serving and those with contradictory motivations can generate an equally convincing, albeit contradictory, set of legal conclusions. This process of legal analysis impairs the actual and potential ordering rôle of international law in stabilizing relations between rival states pursuing incompatible objectives, and yet sharing a common interest in maintaining peaceful relations, a common interest that might take increasing precedence over the goals of conflict in view of the mutual commitment to avoid nuclear warfare.

The *Shimoda* case does not delimit the context to include the remote political goals of the atomic attack, but rather restricts the context to the facts of the attack, the effects of the weapons, and the character of the target area.

This structure of analysis in *Shimoda* is supported by four principal types of legal authority used somewhat interchangeably. First, the positive legal *rules* contained in conventional and customary international law are cited as support. Second, the broader *principles* or *policies* underlying these rules are used both to assess the legality of conduct not expressly covered by the rules and to interpret the proper scope of the existing rules.[69] Third, the court makes general references to the views of international jurists as a basis for its own conclusions. And fourth, and perhaps most significantly, the opinion contains several references to the conclusions reached by one or more of the three experts in the international law of war that were appointed by the court to prepare separate reports on the various points of law raised by the controversy; these reports dealt with the application of the first three sources of law to the issues in *Shimoda* but, given the eminence of the experts and the apparent lack of experience on the part of the court, it does not seem far-fetched to regard these reports as providing the court with authoritative guidance in the case.[70]

III. The *Shimoda* Case and Dominant Modes of Thinking in the International Law of War

There is also a need to gain clarity about the mode of legal analysis appropriate for a discussion of nuclear warfare. *Shimoda* gives us a

[69] O'Brien deals with the connection between rules and principles very well in his articles on military necessity. *Loc. cit.* note 10 above. For general treatment of the relationship between different kinds of legal norms see Schachter, *loc. cit.* note 25 above; see, in general, Pound, "Hierarchy of Sources and Forms in Different Systems of Law," 7 Tulane Law Rev. 475 (1933).

[70] The three experts who submitted opinions to the court were Kaoru Yasui, Shigejiro Tabata, and Yuichi Takano. Each is a professor of international law in a Japanese university.

concrete occasion to consider how it is best to assess the legal status of nuclear weapons in view of the unlikelihood of achieving either clear or effective standards governing their use. In general, there are two dominant modes of thinking found in that part of the international law of war that is concerned with the regulation of instruments of warfare.[71]

The first mode, most familiar in connection with poison gas, is to deal with *the intrinsic legal character* of the weapon, either outlawing or permitting it. The second mode, often said to be residual to the first, asseses legality exclusively by reference to *the context in which the weapon is used* and by reference to certain general principls that are said to limit the conduct of warfare in all circumstances. The *Shimoda* opinion is an amalgam of both modes, as the reasoning relies both upon the intrinsic prohibitions applicable to the use of poison gas and to the contextual principles of the law of war forbidding unnecessary destruction and suffering and, more controversially, requiring belligerent operations to be concentrated against military objectives.

Arguments about the wisdom of defining aggression and about the most suitable form of definition similarly illustrate the contrast between the intrinsic and contextual modes of legal analysis. As well, the related and highly inflamed debates about the interpretation of Articles 2(4) and 51 of the Charter of the United Nations also represent a clash of these two modes.[72] Throughout contemporary discussions of the relevance of international law to the use of force by nation-states there is this conflict between these competing modes of thought. By making the conflict explicit and by sketching some implications of each, it may be possible to move the argument beyond polemics and make it into a more serious discussion of alternative conceptions of world order. In most general terms, those that emphasize the intrinsic mode incline toward a supranational conception of world order, whereas those that emphasize the contextual mode incline toward an international conception of world order.[73]

The *Shimoda* case looks at the legal character of atomic weapons in the context of their use against Hiroshima and Nagasaki, although it does not exclude an intrinsic pronouncement on the issue of legality. This contrasts with most of the early writing on the subject that endeavored to "demonstrate" the intrinsic illegality of these weapons.[74] It also contrasts with those writers, most prominently McDougal-Feliciano, Julius

[71] It should be understood that these two modes of thought are *ideal types* useful to illustrate a basic conflict of emphasis in the relevant legal literature. Almost no writer is a *pure* example of one or the other type, although most lean toward one or the other pole.

[72] *Cp.* Stone, Aggression and World Order (1958), with Sohn, "The Definition of Aggression," 45 Va. Law Rev. 697 (1959); and Henkin, "Force, Intervention and Neutrality in Contemporary International Law," with McDougal's "Comments" in criticism, 1963 Proceedings, American Society of International Law 147, 163.

[73] For a sharp comparison of these two models of international order, see Knorr, "Supranational versus International Models of General and Complete Disarmament," in Barnet and Falk (eds.), Security Through Disarmament 384–410 (1965).

[74] Some examples: Singh, *op. cit.* note 36 above; Schwarzenberger *op. cit.* note 27 above; Spaight, *op. cit.* note 23 above, and The Atomic Problem (1948).

Stone, and William V. O'Brien, who advocate the contextual approach with great ardor but in much broader terms than *Shimoda,* suggesting the relevance of remote political and military goals to a legal analysis of contested acts.[75]

In its extreme form the intrinsic mode of thinking encourages the analyst to conclude that nuclear weapons are either permitted or are prohibited and to offer authoritative guidance to those who act on behalf of nation-states in world affairs as to the requirements of international law.

Few jurists who rely upon the intrinsic mode do so in pure form, especially in analyzing the legal status of nuclear weapons. Rather the more typical inclination is to admit an inability to pronounce one way or the other at this point, and concentrate on offering some tentative guidelines for some aspects of a legal analysis. For instance in the latest edition of Lauterpacht-Oppenheim, distinguished users of the intrinsic mode, Lauterpacht suggests that, if nuclear weapons are used against military objectives and cause little or no collateral civilian damage, then the legality of their use is easier to maintain. This standard treatise also mentions reprisals against prior use as possibly legal and also considers the special case for using nuclear weapons "against an enemy who violates rules of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion."[76] The example of this latter possibility selected is the argument for using atomic bombs, had they existed, against Nazi Germany to deter its commission of genocide against innocent civilians. Lauterpacht-Oppenheim also venture the view that the use of atomic bombs to prevent an aggressor from achieving world domination might have a special status, even if the use is considered to be one that would normally constitute a violation of international law. The passage goes on to say that the act would remain a violation, as international law applies "even in relation to an aggressor in an unlawful war," but concludes cryptically that, nevertheless, there is "no decisive reason for assuming that, in the extreme contingency of the nature described above [defense against world domination], that particular principle would or could be scrupulously adhered to."[77] This quotation serves

[75] Examples of the contextual approach include McDougal-Feliciano, O'Brien, and Julius Stone, *op. cit.* note 36 above. In the discussion that follows there is an important distinction to be noted between the use of context by Shimoda and its use by writers such as Myres McDougal and Julius Stone. The Shimoda decision relies upon contextual thinking to suggest that "the facts" as well as the properties of a weapon must be examined to determine whether the use of a weapon on a given occasion is legal or illegal, and thereby to resist the temptation to decide whether atomic weapons, as such, are legal or not. McDougal and Stone, on the other hand, rely upon contextual thinking to take into account considerations of justice and policy, whether the user of the weapons was pursuing beneficial objectives, and so on. It is mainly in this latter sense of context that "the contextual approach" seems vulnerable to criticism as encouraging a subjective appreciation of the content of legal rights and duties.

I wish to thank Professor Leo Gross for pointing out to me the need for clarification on this basic matter.

[76] 2 Oppenheim, International Law 347–351 (7th ed. 1952).

[77] *Ibid.* at 351 (footnote 2).

to disclose the strain placed upon legal approaches based on intrinsic modes that seek to prescribe standards and yet allow for reasonable expectations about probable courses of behavior. It is commonplace to assume that a state confronted by a choice between subjugation and victory will do whatever is likely to promote victory, just as a man confronted by a choice between starvation and theft is likely to steal. All law, not just international law, is ineffective in extreme situations. If one, however, conceives the extreme to be the general or typical situation in warfare, as does Baxter with regard to the use of militarily significant weapons, then it becomes sensible to point out the deception and futility of legal regulation. In contrast, if one feels that there are marginal occasions on which the decision to use weapons depends to some extent, at least, on their legal status, then regulation may be a contribution to world order, even if one is aware that the legal prohibition cannot be expected to restrain use in extreme situations, that is, in those situations where breaking the law might make a decisive difference in the outcome of the war.[78]

The competing mode of analysis stresses the context of use. It refrains, as *Shimoda* refrained, from reaching the conclusion that nuclear weapons are either *necessarily* legal or illegal.

In the McDougal-Feliciano instance of the contextual approach, the crucial indication of illegality would be "disproportionate and unnecessary destruction of values."[79] With reference to nuclear weapons these authors do note such special characteristics of nuclear weapons as the prolonged period over which lethal damage takes place, the occurrence of genetic injury, and the possibility of effects upon non-participating countries. For this reason it may require "a showing of much more stringent necessity and much larger military advantage" to sustain the legality of a challenged use of nuclear weapons.[80] But these authors, consistently with their whole approach, refuse to pass any judgments on the intrinsic legal character of nuclear weapons. Everything depends on context.

The contextual approach used by McDougal-Feliciano should also be related to their development of a policy-oriented jurisprudence.[81] *Shimoda* tries to exclude policy factors from its legal analysis and arrive at a conclusion on the law that would be persuasive regardless of policy preferences. McDougal-Feliciano regard international law as a process by which authoritative decisions are reached. They recommend a contextual approach to decision-makers and spell out in systematic detail the factors that are to be taken into account if a reasonable effort is to be made to maximize the community policies at stake. The judge (or other official faced with the need to construe the law) is asked to make a finding of net policy effects arising out of the pattern of conduct challenged as illegal. As McDougal has so often maintained, the expectations of the community concerning what is legal is one crucial policy factor to be taken into ac-

[78] How important is the marginal occasion for this subject matter? It is difficult to carry a response beyond intuitive inclinations connected with the fear of nuclear war as distinct from the fear of other calamities that might be supposed to arise from a renunciation of nuclear weapons.

[79] McDougal-Feliciano at 663.

[80] *Ibid.* at 667.

[81] See Preface vii–xi.

count. Therefore, legal precedent is not discounted nor is it made necessarily determinative.

The chief advocates of the contextual approach for assessing the permissibility of using nuclear weapons are rather indefinite about how to go about identifying the limits of permissibility. McDougal-Feliciano and O'Brien, both conscious of their allegiance to Western interests in the Cold War, are very reluctant to foreclose legal recourse to nuclear weapons by pronouncing limiting conditions in advance. Writing under the impression that the United States was at the time superior in the field of nuclear armaments and inferior in conventional armaments—an impression whose accuracy is most difficult to assess—these authors favor taking account of political objectives (defeat of totalitarian Powers, human dignity, etc.) as well as military ones, in the assessment of the legality of conduct.[82] Such an approach leads to a double standard that might enable a "rational" decision-maker to reach contradictory results for similar sets of facts, depending on his view of the motives of the actor and the worth of the victim. Thus this mode seems to legitimatize the use by the United States of atomic bombs against Japan, although it does so without any of the close analysis of context it prescribes,[83] and would seem also capable of holding illegal their use by Germany, in the event that they alone had developed and used such weapons against, say, England.

The advantage of this broad contextual mode is to get away from the static view of the relevance of law to behavior. Furthermore, it can incorporate considerations of effectiveness as a contextual factor rather than as a determinative element in law.[84] McDougal-Feliciano place appropriate emphasis on what is reasonable, given the expectations of the community about permissible limits of conduct. It would appear that their approach would benefit from a somewhat stricter definition of context and from a somewhat reduced fear of classifying certain acts or instruments of conduct as intrinsically illegal. McDougal-Feliciano are apparently unwilling to curtail the subjectivism of their contextual approach, a subjectivism made acute by nationalism and by the exceptionally decentralized character of international society during a major war; these authors are unwilling to lay down certain minimum rules of the game that apply independently of circumstance. Instead, in the setting of war, they insist that all legal assessments must be made by weighing the facts of a context in light of the overarching polarity created by considerations of military necessity on the one hand, and by considerations of humanity on the other. This is one way, of course, to accommodate the pressures that lead states to do whatever is necessary to win, regardless of what the law says they should do.

[82] Illustrations of the candor with which these authors take Cold-War considerations into account are available. McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale Law J. 648 (1955); O'Brien at 35–38, 105–113.

[83] McDougal-Feliciano content themselves with a longish and equivocal comment in footnote 421, pp. 660–661, and O'Brien skirts an inquiry on pp. 103–104.

[84] Compare Baxter's views, pp. 782–783 above.

An appraisal of the two modes of thought depends somewhat on what one understands to be the major purpose of the law of war. The intrinsic approach, if restrictive, will tend to be ignored by those making policy during war, whereas, if permissive or opportunistic, it will tend to make law irrelevant. On the other hand, it gives the appearance of objectivity when used to look back upon challenged activity so as to judge legal responsibility; as well, its clarity of reference makes it possible to understand the distinction between what is legal and what is not.

In contrast, a contextual analysis that gives a policy-maker flexibility to pursue realistic belligerent policies may allow the constraining influence of normative considerations to play a rôle in shaping action. Law does not seem Utopian or irrelevant, but rather offers a prudent way to take some account of considerations favoring restraint, avoidance of suffering, and so on. The polarity between what is legal and what is militarily effective is eliminated and both dimensions are given relevance along with many other considerations. On the other hand, the judgmental act is complicated because the nature of what is legal is connected up so closely with controversial ideas about what is politically desirable. As such, it tends to appear as a vindication of power and a rationalization of victory, as it is normally the successful side that sits in judgment of the loser or at least posits the controlling standard of what is politically desirable. *Shimoda* is so interesting because it is an exception, although one that makes its legal appraisal independent of any consideration of what was politically desirable; in fact, in its concluding remarks it concedes the heavy burden of Japan's responsibility for World War II.[85]

IV. The Legal Status of Nuclear Weapons Today

As Section III has argued, the resolution of the issue of legality is affected, in the first instance, by whether one accepts that mode of juristic thinking that deals with *intrinsic character or context of use.*

If the approach of intrinsic character is taken, it is possible to follow the U. S. service manuals and say that nuclear weapons are as legal as other weapons, absent an express prohibition. It is also possible, however, to invoke the action of the General Assembly in 1961, especially Resolution 1653 (XVI), to illustrate the view that nuclear weapons are intrinsically illegal. Operative Section I of the Resolution puts the position strongly by declaring that:

> (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
>
> (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
>
> (c) The use of nuclear and thermo-nuclear weapons is a war

[85] As the opinion puts it: "The defendant State caused many nationals to die, injured them, and drove them to a precarious life by the war which it opened on its own authority and responsibility." (p. 250.)

directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

(d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization;[86]

. . . . .

It is additionally possible to say that nuclear weapons are intrinsically illegal, either by validating and extending the prohibition on poison gas,[87] or by saying that the principles underlying the law of war outlaw weapons with the properties of nuclear weapons. Even under this approach, as Lauterpacht-Oppenheim show, exceptions for reprisal against an evil enemy may make the use of nuclear weapons legal under certain conditions. It is also possible, recalling Baxter's argument, to treat as lapsed for ineffectiveness, despite the action taken by the General Assembly on the opposite assumption, that portion of the international law of war purporting to regulate decisive weapons.

On the other hand, the approach by way of context necessarily refrains from either a blanket prohibition or endorsement of the legality of nuclear weapons. Their legality depends on whether, as used, they cause damage disproportionate to the military effect and whether their use is reasonably related to the pursuit of a legitimate belligerent objective. Those tending to widen the context to include the over-all war effort and those tending to define belligerent objective as including the realization of peace on an acceptable political and moral basis seem to have a more flexible and manipulative view of when the use of nuclear weapons is legal, than do those contextualists who limit what is relevant to the ratio between military and non-military destruction at the scene of the nuclear attack. The *Shimoda* case illustrates this more conservative use of context.

How does one construe these somewhat conflicting lines of legal authority and methods of argumentation? Resolution 1653 (XVI) is expressive of a certain level of international consensus in favor of the prohibition of nuclear weapons under all circumstances. There is no agreement about how to assess the legal weight of resolutions by the General Assembly either as independent legal authority or as evidence of a relevant consensus expressive of the will of the international community.[88] The *Shimoda* case tends to reinforce the Assembly judgment, although its terms are limited to the facts of Hiroshima and Nagasaki; given the increased power

[86] U.N. General Assembly Res. 1653 (XVI) adopted by a vote of 55–20–26 (roll call).

[87] See authorities cited in note 36 above.

[88] On weight to be given General Assembly resolutions see Lande, "The Changing Effectiveness of General Assembly Resolutions," 1964 Proceedings, American Society of International Law 162; Skubiszewski, "The General Assembly of the United Nations and its Power to Influence National Action," *ibid.* at 153; in general, on the rôle of consensus in the formation of legal standards, see Jenks, "The Will of the World Community as the Basis of Obligation in International Law," in Law, Welfare, and Freedom 83–100 (1963), and Falk, "The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking," 50 Va. Law Rev. 231, 243–248 (1964).

of nuclear weaponry and the emphasis of the court on the properties of the earlier atomic devices and their analogy to gas, it would seem reasonable to regard *Shimoda* as supportive of a virtually unconditional prohibition of the use of nuclear weapons.

On the other hand, there is no prospect of implementing this consensus favoring prohibition by effective responses in the event of non-compliance. And, unlike poison gas, the national security policies of several leading states are intimately dependent upon their capability and willingness to use nuclear weapons. Short of nuclear disarmament, something not presently foreseeable, there is little prospect that legal restraints, as distinct from fear of retaliation, will have any influence upon a decision to use nuclear weapons, although contextual factors related to suffering and unnecessary damage are likely to inhibit all but the most callous belligerent. We are returned then to the central dilemma posed so clearly by Baxter's explanation of the ineffectiveness of that portion of the law of war that purports to regulate the use of weapons that a belligerent might come to regard as decisive.

The legal status of nuclear weapons, then, is very inconclusive. It depends greatly on the perspective one selects as dominant. There is fairly convincing evidence of a gathering consensus expressive of the will of the international community and certainly not irrelevant to the creation of binding legal obligations.[89] And there is on the other hand the awareness that the prospect of effectiveness is an integral element in the concept of law, and serves the key functions in international society of avoiding deception by, or sentimental reliance upon, norms that are detached from political realities. Those who advocate the adoption of a "No First Use Proposal" for nuclear weapons as an arms control measure are trying to shape the political realities so that they come to support the international consensus.[90] For, to convince themselves and others that a no-first-use policy has been seriously adopted, it is necessary for participating states to adapt defense policies in such a way that security interests can be upheld without having to threaten or use nuclear weapons.

V. Conclusion

However understood, *Shimoda* is a dramatic legal document. It warrants study and its analysis supports a widespread inquiry into the relevance of international law to the regulation of nuclear war. We need not renounce our skepticism about the capacity of international law to regulate war in reaching the conclusion that this most serious of subjects might benefit from serious study. And looking back at Hiroshima and Nagasaki is one of the better ways of trying to look ahead and gain insight into the various impacts of nuclear weaponry upon the developing international law of war.

[89] See especially Final Act of 1964 Cairo Conference of Non-Aligned Countries.

[90] For discussion of various aspects of this approach, see Tucker, Knorr, Falk, and Bull, "Proposal for No First Use of Nuclear Weapons: Pros and Cons," Policy Memorandum No. 28, Center of International Studies, Princeton University, 1963.