

Fukushima nuclear power accidents and human right remedy from the viewpoint of International Law

(Draft)

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I. Introduction

The theme given to me by the organizing committee is “Fukushima nuclear power accidents and human rights remedy from the viewpoint of International Law”. In addressing this very tough issue, I would like to pick up four points from my angle.

First, regarding nuclear disaster victims, what provision in respect of human rights or protection of human beings are there in International Law? Secondly, how broad and lasting is the situation of the damage in Fukushima nuclear accidents now? Thirdly, what human rights violations have been addressed in context of Fukushima nuclear victims especially by international human rights bodies? Lastly, what we should do to make use of those findings of the bodies to improve the situation of Fukushima nuclear victims?

II. International Law and Nuclear disaster victims

In international law in general we do not see a lot of provisions on protection of the nuclear disaster victims. In international nuclear law, we find some treaties on nuclear accidents. The 1994 Convention on Nuclear Safety provides in its Article 16 (2):

Each Contracting Party shall take the appropriate steps to ensure that, insofar as they are likely to be affected by a radiological emergency, its own population and the competent authorities of the States in the vicinity of the nuclear installation are provided with appropriate information for emergency planning and response.

This provision seems to be related to the rights to information of nuclear disaster victims. But it is not specific about “appropriate steps” or “appropriate information”. So we cannot find here full protection in respect of the rights to information of individuals concerned.

The 1986 Convention on Early Notification of a Nuclear Accident has also a provision about information to be provided (Article 5). But in its paragraph 3 “Information received... may be used without restriction, except when such information is provided in confidence by

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the notifying State Party.” This means there is room for confidential information about nuclear accidents. So it does not ensure the rights to information fully.

The 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency put on the States Parties the obligation to cooperate between themselves and with the IAEA to facilitate prompt assistance in the event of a nuclear accident “to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases” (Article 1(1)). But it does not provide the treatment of nuclear victims no more in detail.

We also see some treaties on civil liabilities for nuclear damages. Some common feature among them like absolute liability of the operator for nuclear damage or indiscriminate application of those treaties base upon nationality, domicile or residence are favor of nuclear disaster victims². But jurisdiction is limited to the courts belong to the states where nuclear accidents happened³. And “the nature, form and extent of the compensation, as well as the equitable distribution thereof,” are under the law of the competent court⁴. According to those elements, the regime of civil liabilities for nuclear damages under international law is depending upon national laws of the states concerned. Then it is not necessarily concluded that it has a decisive role in the remedy of human rights of nuclear disasters victims.

Besides, we know there are some rules on protection of refugees or internally displaced persons. Especially the Guiding Principles on Internal Displacement was adopted by the UN Commission on Human Rights in 1998. This instrument do not have a binding force but is intended to “identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration” (Introduction, para. 1). According to its definition of the internally displaced persons, the principles undoubtedly apply to nuclear disasters victims, or people evacuated from the contaminated areas. The instrument confirms that the principles reflect and are consistent with international human rights law and international humanitarian law (Ibid, para. 3). Therefore in order to find binding principles and rules on remedy of human rights of nuclear disaster victims we must examine the field of international human rights law. At the end, we have arrived at the International Human Rights Law.

Before that, we should not ignore the development of principles and rules on the protection of human beings in natural disasters. In 2016 the International Law Commission adopted “Draft articles on the protection of persons in the event of disasters” and decided to recommend to the UN General Assembly the elaboration of a convention on the basis of the

² See in stance Art. 4 (1) and 13 (1) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage.

³ See also Art. 11.

⁴ See also Art. 8.

draft articles on the protection of persons in the event of disasters. Now it is under consideration.

III. The situation of the damage in Fukushima nuclear accident

To begin with, we would like to confirm the situation of the damage in Fukushima nuclear accident by introducing some relevant figures.

It has been just 6 and half years since the Great East Japan Earthquake and Fukushima nuclear accident occurred in 2011. The Fukushima Daiichi Nuclear Power Plant accident is considered as “Level 7 (major Accident)” which is the most serious on the International Nuclear Events Scale (INES).

About 123,000 people now are under the nationwide evacuation caused by the Great East Japan Earthquake.

56, 082 persons now are evacuated in or out of Fukushima Prefecture according to the Fukushima Prefecture Government. This figure related to Fukushima is strongly assumed to be caused by the nuclear accident. Given that effect of the accident is not limited to the Fukushima Prefecture, the number of evacuated persons caused by the accident is supposed to be a little more.

The situation of the damage caused by the accident in more detail will be also addressed by my colleagues in the next session.

I would like to remind you here of a finding of the 1996 Advisory Opinion by the International Court of Justice (ICJ). The Court held:

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area...Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.⁵

Of course we should tell the effect of the use of nuclear weapons from that of the nuclear accidents. But it is valid that the above mentioned paragraph of the Opinion applies to the effect of nuclear accidents.

First of all, the effect of nuclear accidents and its damage cover a very wide area. In the case of the Fukushima nuclear accident, the area under evacuation order as of June 2011 covered about 1,100 square kilometers.

Second feature is the incredible longevity and continuity of the damage. According to the June 2011 press release of the Nuclear and Industrial Safety Agency, the total amount of radioactive substances discharged by the Fukushima Daiichi Nuclear Power Plant accident into the air is estimated at 770,000 terabecquerels (10^{12}). According to the October 2011 press

⁵ See ICJ Reports 1996, pp. 243-244, para. 35.

release of the Japan Atomic Energy Agency, estimated total amount of radiation discharged by the Fukushima Daiichi Nuclear Power Plant accident into the sea, including radiation fallout, was 15 quadrillion (10¹⁵) becquerels. Decontamination work is going on now. But it is difficult to find the end of that work in the foreseeable future.

So those features lead us to the third one of the damage. It is comprehensiveness and diversity. The effect of nuclear accident covers all aspect of each victim's life. Nuclear victims face the risk of lost. They lost their families, land, home, workplace, health, safety of food, their community, and were forced to flee to other areas. And men, women, children, elder people, persons with disabilities, and foreign people etc. are affected. Maybe environment itself is also a victim.

Lastly we should affirm the unpredictability of the damage. As you know, the damage of radiation appears on health in later stage. Now it is under the course of appearance. We need to observe the status of nuclear victims carefully for long time.

Against those features of the damage, we need to make it clear what human rights of Fukushima nuclear disaster victims are violated and how they should be remedied.

IV. Human Rights Violation in Fukushima Nuclear Disaster from viewpoint of Some International Human Rights Bodies

A. The Grover Report (2013)

Then what human rights violations have been addressed in context of Fukushima nuclear victims especially by international human rights bodies?

Japan is now a state party to some treaties regarding international human rights and now also a member of the UN Human Rights Council. The situation of human rights in Japan including that of Fukushima nuclear victims is supposed to be observed from those international human rights standards.

In 2013 the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health issued a report on the base of his mission to Japan.⁶ The Special Rapporteur, Mr. Anand Grover, visited Japan from 15 to 26 November 2012. During the visit, he ascertained the country's endeavors to implement the right to health, and in particular considered the issues relating to the realization of the right to health in the wake of the nuclear accident at the Fukushima Dai-ichi nuclear power plant 11 March 2011, the events leading up to it, and emergency response, recovery and mitigation. In the report, the Special Rapporteur commended Japan for some steps taken and its commitment to the realization of the right to health. But the report encouraged the

⁶ See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/HRC/23/41/Add.3

Government of Japan to address a number of serious challenges and to consider particular areas for improvements in order to realize that right fully. With a view to facilitating that endeavor, he made a number of recommendations for the Government of Japan. This is the first fact-finding report on the situation of nuclear disaster victims in Japan after Fukushima nuclear accident in viewpoint from international human rights standard in the UN.

The recommendations by the Special Rapporteur covers the following fields relating to the situation of Fukushima nuclear victims.

- formulation and implementation of its nuclear emergency response system
- health monitoring of the affected population
- policies and information on radiation doses
- decontamination
- transparency and accountability within the regulatory framework
- compensation and relief
- effective community participation in all aspects of the decision-making processes relating to nuclear energy policy and the nuclear regulatory framework

By the way, there are some implementation procedures of the standards established under those human rights treaties: the state reporting system, the inter-state complaints procedure, and the individual communication procedure. The latter two procedures are not necessarily compulsory. Japan accepted the former one system, and rejected the latter two procedures. So only through the state reporting system, we can review whether Japan respects the human rights in context of Fukushima nuclear disaster.

B. CESCR's Observations (2013)

Since 2011, some human rights bodies have issued the Concluding Observations related to the States Party's Report of Japan. They expressed their concerns about the situation of Fukushima nuclear victims and recommended Japan to take some steps to improve it.

In 2013, the Committee on Economic, Social and Cultural Rights (CESCR) adopted its concluding observations where the Committee said:

24. Noting the complexity of relief response to the consequences of the Great East Japan Earthquake and the Fukushima nuclear accident, the Committee is concerned that the specific needs of disadvantaged and vulnerable groups, such as older persons, persons with disabilities, and women and children, were not sufficiently met during the evacuation and in the rehabilitation and reconstruction efforts (art. 11, 2(2)).

Noting that the lessons learned from the consequences of the Great East Japan Earthquake and the Fukushima nuclear accident have led to the adoption of new

arrangements to better respond to the needs of affected communities, including vulnerable groups, in future relief and reconstruction efforts, the Committee recommends that the State party adopt a human rights-based approach to disaster response, risk mitigation and reconstruction efforts. In particular, the Committee recommends that the State party ensure that disaster management plans do not discriminate or lead to discrimination in the enjoyment of economic, social and cultural rights.

The Committee requests the State party to provide in its next periodic report comprehensive information, including statistical data disaggregated by sex and vulnerable group, on the management of the consequences of the Great East Japan Earthquake and the Fukushima nuclear accident as well as on victims' enjoyment of economic, social and cultural rights during the evacuation and in the rehabilitation and reconstruction works. The Committee also requests the State party to include information on how victims' right to justice has been guaranteed.⁷

C. CCPR's Observations (2014)

In 2014 the Human Rights Committee (CCPR) established under the International Covenant on Civil and Political Rights considered the state party's report of Japan. Its concerns and recommendations are below:

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24. The Committee is concerned that the high threshold of exposure level set by the State party in Fukushima and the decision to cancel some of the evacuation areas give people no choice but to return to highly contaminated areas (arts. 6, 12 and 19).

The State party should take all the necessary measures to protect the life of the people affected by the nuclear disaster in Fukushima and lift the designation of contaminated locations as evacuation areas only where the radiation level does not place the residents at risk. The State party should monitor the levels of radiation and disclose that information to the people affected in a timely manner.⁸

The Committee concerned about the returning policy in that the policy violated the right to life, the right to move and the right to speech.

⁷ See Concluding observations on the third periodic report of Japan, adopted by the Committee at its fiftieth session (29 April-17 May 2013), E/C.12/JPN/CO/3, p. 6, para. 24.

⁸ See Concluding observations on the sixth periodic report of Japan, CCPR/C/JPN/CO/6, p. 8, para. 24.

D. CEDAW's Observations (2016)

In 2016 the Committee on the Elimination of Discrimination against Women (CEDAW) established its concluding observations on the reports of Japan. The Committee concerned the health status of evacuated persons and women and recommended the following.

Health

36. The Committee notes the efforts made by the State party to address health concerns related to radiation following the Fukushima Dai-Chi Nuclear Power Plant accident in 2011. The Committee, however, notes with concern the State party's plans to lift the designation as evacuation zones of contaminated areas with radiation exposure levels under 20 millisieverts per year, which may have a disproportionate effect on the health of women and girls.

37. The Committee recommends that the State party reaffirm that the lifting of designation of places as evacuation zones of contaminated areas with radiation exposure is consistent with internationally accepted knowledge on risk factors for women and girls considering that women are more sensitive to radiation than men. It further recommends that the State party intensify the provision of medical and other services to women and girls affected by radiation, in particular pregnant women in the Fukushima Prefecture.

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Disaster risk reduction and management

44. The Committee commends the State party for its leadership in disaster risk reduction and management and its contribution to global efforts to adopt the Sendai Framework for Disaster Risk Reduction 2015-2030. The committee also commends the State party for mainstreaming gender perspectives into its policies on disaster risk reduction, and the adoption of a national Basic Disaster Management Plan. However, the Committee is concerned at the low participation of women in leadership roles in the area of disaster risk reduction and management at the national and local level following the Great East Japan earthquake in 2011.

45. The Committee recommends that the State party accelerate the participation of women in decision-making and recovery processes related to disasters at all levels, in particular at the local level. It should also continue its efforts aimed at integrating a gender perspective into all sustainable development policies, as well as into disaster risk reduction and post-disaster management.⁹

⁹ See Concluding observations on the combined seventh and eighth periodic reports of Japan, CEDAW/C/JPN/CO/7-8, p. 11, paras. 36-37 and pp. 12-13, paras. 44-45.

Among those recommendations by the Special Rapporteur and the Committees, there are some common features that we should notice. Those points reflect the current problematic aspects of the situation of Fukushima nuclear victims.

First whether the policy of lifting evacuation and return is appropriate or not is an issue. Despite CCPR and CEDAW concerned, Japan carried out its plans to lift the designation as evacuation zones of contaminated areas with radiation exposure levels under 20 millisieverts per year. My colleagues will address this topic later.

Secondly, as the Special Rapporteur and CCPR suggested, dissemination of information and findings about effect of radiation exposure is critical. It is important for Fukushima nuclear disaster victims to get sound knowledge on its risk in order that they can enjoy the right to health fully. Ordinary people do not know about what to know about radiation. As we know, the risk of radiation has uncertainty and unpredictability in a short term. Therefore access to information of radiation should be ensured while people affected should be insightful on that problem. Experts need to explain the risk standing in side of those ordinary people. And the Government should do promote education about radiation more sincerely.

Lastly, as the Special Rapporteur demanded and CEDAW suggested, the Government has to ensure the participation of the victims into a decision making process relating to nuclear energy policy and the nuclear regulatory framework. The Government of Japan now plans to restart nuclear reactors step by step. But as the Grover Report said, “a risk-benefit analysis is not in consonance with the right to health framework, as it gives precedence to collective interests over individual rights.”¹⁰ It is the case not only with the right to health but also most of all human rights. Now Japan is in the course of economic recovery from the East Japan Great Earthquake and Fukushima nuclear accidents. 2020 Tokyo Olympic also drive it rapidly. Human rights first thinking should be established in that course.

V. Conclusion

Beside those pointed in the concerns and recommendations, there are many other problems to be resolved around the situation of Fukushima nuclear victims. Against this background what should we do to make use of those findings by the international human rights bodies or in the international human rights procedures?

At first, we can explore to make use of those recommendations in the domestic litigations. Provisions of treaties concluded by the Government of Japan have legal effect as part of its internal law in accordance with article 98, paragraph 2, of the Constitution. Whether or not to apply directly provisions of treaties is determined in each specific situation,

¹⁰ See Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Addendum, A/HRC/23/41/Add.3, p. 16, para. 47.

taking into consideration the purpose, meaning and wording of the provisions concerned.¹¹ Therefore in Japanese domestic courts there is a little case in that direct application or self-execution of international human rights treaties is endorsed. But since the Constitution is interpreted as covering the same range as international human rights instruments in almost case, we can insist on invalidity of laws and administrative measures as they infringe human rights unconstitutionally by referring international human rights treaties or those human rights bodies' recommendations. Let me be clear. We can use international human rights bodies' recommendations as instruments of interpretation of the constitution. In practice, we do not see so many such cases in litigations regarding Fukushima nuclear victims.

Secondly, it is needed for the government of Japan to respond to those recommendations sincerely. Despite the recommendations do not have binding force, they are authoritative interpretation and application of the relevant provisions in the international human rights treaties to which Japan is a state party. Then Japan has accountability for those recommendations. Fukushima nuclear victims and Civil Society organizations can demand the government to take such necessary steps as legislation or other administrative measures to give effect to the rights on which the human rights bodies expressed their concerns.

Last but not least, Civil societies can monitor this intercourse between the government of Japan and the international human rights bodies, so called "constructive dialogue", and participate in that dialogue by submitting their own counter reports to the bodies. Beside the international human rights bodies I mention here, Japan is also state party to other human rights treaties regarding children, persons with disabilities and so on. In those treaties the state reporting systems are available. And other Special Rapporteur' visit like Mr. Grover is also available. Japan issued a standing invitation on 1 March 2011. By this invitation Japan always accept requests to visit from all special procedures. Through these procedure, civil societies or human rights NGOs can put it on the table how grave and sever the situation of Fukushima nuclear victims is.

Those international and domestic implementation of international human rights standards are critical to improve the situation of Fukushima nuclear victims and remedy their human rights. We need to explore the role of international human rights law and its implement procedures more than ever.

¹¹ See Fourth periodic reports of Japan to the Human Rights committee, 16 June 1997, CCPR/C/115/Add.3, p. 4, para. 9.