

Examination of the view of the Government of Japan on the use of nuclear weapons from the viewpoint of the IHL commitment

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The purpose here is to examine the view of the Government of Japan on the use of nuclear weapons from the viewpoint of the IHL commitment in 2010 NPT Review Conference, and to present some problems to overcome.

In its oral pleadings before the ICJ in the *Nuclear Weapons Advisory Opinions case* in 1995, Japan stated:

“[T]he Government of Japan believes that, because of their immense power to cause destruction, the death of and injury to human beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation.”¹

And in 2009 Japan repeated almost the same statement in the UN first committee, as follows:

“Japan also believes that, because of their immense power to cause destruction, death and injury to human beings, the use of nuclear weapons is clearly contrary to the fundamental humanitarianism that provides the philosophical foundation of international law.”²

This consistency suggests that the position of Japan is unchanged.³ But those

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¹ See *CR 1995/27*, p.18, available at <http://www.icj-cij.org/docket/files/95/5935.pdf>. See also Written Statement re: question put by UNGA, available at <http://www.icj-cij.org/docket/files/95/8670.pdf> and Written Statement re: question put by WHO, available at <http://www.icj-cij.org/docket/files/93/8768.pdf>.

² UN Doc, A/C.1/64/PV.22, p. 11.

³ Subsequently to the Nuclear Weapons Advisory Opinions, Prime Minister Hashimoto stated the view of Japanese Government was not changed at Foreign Affairs Committee, House of Councilors on June 5, 1997.

are very brief statements without any reasoning. What is the conclusion of those statements? Does Japan accept to apply International Humanitarian Law to the use of nuclear weapons? What rules and principles apply to the weapons? How did the Government interpret them?

Of course Japan Self-defense Forces (JSDF) has many military manuals, almost all of which are not available in public. But prior to submitting the written statements to the ICJ, there were some enthusiastic debates in the Diet where government officials explained their position. Therefore from these debates on the written statements, I would like to extract some features of the view of the Government.

First, Japanese Government implicitly rejected the illegality of the use of nuclear weapons. In the Draft of its written statement which presented at the Diet prior submission to the ICJ, government officials explained: “The use of nuclear weapons is not decidedly concluded to be contrary to contemporary positive international law from the purely legal view point and through objective examination of state practice so far and teachings of the publicists and so on.”⁴ Due to strong criticism in and out of the Diet, the Government decided to delete these phrases.⁵ But it is clear from the debates after the decision that they did not change their fundamental legal view, but just its expression.⁶

Secondly, Japanese Government accepted that principles of IHL apply to the use of nuclear weapons. In the Diet, Government officials invoked primarily two principles of IHL as positive international law to support the above deleted phrases. The one is the prohibition of indiscriminate attack. The other is the prohibition of unnecessary suffering. They also recognized nuclear weapons have “immense power to cause destruction, the death of and injury to human beings.” But they did not conclude the use of nuclear weapons necessarily violate these principles.

⁴ Outline of the written statement to be submitted to the ICJ was presented by Foreign Affairs Ministry at Budget Committee of the House of Representatives on June 8, 1994. The full text is in *Asahi Shimbun*, June 9, 1994, p. 2.

⁵ Statement of Foreign Minister Kakizawa, at Budget Committee of the House of Representatives on June 8, 1994.

⁶ For example, statement of Foreign Minister Kakizawa, at Committee on Foreign Affairs, the House of Councilors on June 20, 1994. See also Interview with Mr. Tanba Director General of Treaties Bureau, Ministry of Foreign Affairs, *Asahi Shimbun*, June 11, 1994.

Thirdly, in explaining the positive international law regulating the means and methods of warfare, Government officials repeatedly focused on the balance between military necessity (military effectiveness) and the humanitarian requirement under that law.⁷ On this premise they go on to explain their position.

As for the prohibition of indiscriminate attack, they recognized that prohibition of attacking civilians is an established principle of International Law. But they stated the use of nuclear weapons in the area where civilians and military are mixed is not necessarily contrary to International Law, suggesting to acceptable collateral damage to civilians.⁸ They dealt with the proportionality rule implicitly in the context of the prohibition of indiscriminate attack. It seems that they did not distinguish the former from the latter.

As for the prohibition of unnecessary suffering, they also regarded it as an established principle. But they argued that it is just a general standard. Their yardstick as to whether nuclear weapons are included in the category of weapons causing unnecessary suffering depends on the existence of a specific prohibition under a treaty rule, in the same way as in case of dum-dum bullet or poison gas.⁹ They insisted that analogy to the existing other prohibited inhumane weapons is inappropriate.¹⁰

For these reasons, the government officials concluded that “the use of nuclear

⁷ For example, Statement of Director General Tanba, at Committee on Foreign Affairs, the House of Representatives, June 8, 1994. See also Interview with Tanba, *supra* note 6.

⁸ *Ibid.*

⁹ Statements of Director General Tanba, at Foreign Affairs Committee, the House of Representatives, June 8, 1994, Foreign Affairs Committee, the House of Councilors, June 20, 1994, Foreign Affairs Committee, the House of Representatives, June 22, 1994. See also interview with Tanba, *supra* note 6. But in its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Mayor of Nagasaki stated that it was of the understanding that “the free and unlimited selection of weapons is unacceptable in terms of international law concerning warfare, and that ... the infliction of unnecessary suffering ... is prohibited, even with regard to weapons that are not expressly banned”. *CR 1995/27*, p. 37. The representative of Japan stated: “[T]he Mayors of Hiroshima and Nagasaki City are statements made as witnesses and independently of the position of the Japanese Government. In particular, those parts related to elements other than facts do not necessarily represent the views of the Government.” *Ibid.*, p. 22. See also, ICRC, *Customary international humanitarian law*, vol. I, Cambridge UP., 2005, pp. 242-243, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70#refFn8.

¹⁰ Statement of Tanba, Foreign Affairs Committee, the House of Councilors, June 20, 1994.

weapons is not decidedly concluded to be contrary to contemporary positive international law” in its draft written statement to the ICJ. This conclusion left room for legal use of nuclear weapons.

One might see this conclusion with some reservations. The government officials do not mention reprisal or right of self-defense. Indeed the applicable law they consider is the same with that in the Shimoda Case concerning the Atomic Bombing in Hiroshima and Nagasaki.¹¹ The government officials refer to “immense power to cause destruction”, but do not touch on its uncontrollability.¹² They might not have thoroughly consider the questions put to ICJ by WHO and UNGA.¹³

The view of Japanese Government in the course of drafting the written statements to the ICJ is surely insufficient in the reasoning and unsatisfactory in the conclusion. But the problems it raised are important. I have two points.

The first point is the balance between military necessity and humanitarian requirement. It concerns both the prohibition of indiscriminate attack and that of unnecessary suffering. For example, whether an attack is indiscriminate or not is decided by excessiveness of collateral damage to civilian compare with anticipated military advantage.¹⁴ We find here the balance. Whether a weapon falls in the category of weapons causing unnecessary suffering or not is decided by whether the harm caused by the weapon is unavoidable to achieve legitimate military objectives.¹⁵ We find it here, too.

¹¹ District Court of Tokyo, *Ryuichi Shimoda et Als. v. The State*, Judgment of 7 December 1963, published in *International Law Reports*, Vol. 32, 1966, p. 626.

¹² In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Mayer of Nagasaki, not the Government of Japan, stated: “[W]ith their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction between combatants and non-combatants or between military installations and civilian communities, and moreover that the radiation released by these weapons cannot be confined to specific military targets. It can only be said, therefore, that nuclear weapons are inhuman tools for mass slaughter and destruction.” *CR 1995/27*, p. 36.

¹³ Besides, the authorities in the government which was responsible for this draft was Ministry of Foreign Affairs. Defense Agency (of those day, now Ministry of Defense) or JSDF might not have been involved in the drafting.

¹⁴ For example see Article 51(5)(a) of 1977 Additional Protocol I.

¹⁵ ICJ defined unnecessary suffering as “a harm greater than unavoidable to achieve legitimate military objectives”. Legality of the threat or use of nuclear weapons, Advisory Opinion, *ICJ Reports 1996*, para. 78, p. 257.

What is military necessity, military advantage, or legitimate military objectives? Are their contents agreed with among States? ICRC Study on *Customary International Humanitarian Law* shows that there are various views among States on these concepts¹⁶. Indeed the concept of *Kriegsräson* is unacceptable. But if the meaning of military necessity which is regarded as narrower than that of *Kriegsräson* is stretched unlimitedly, it goes very close to *Kriegsräson*. Such a possibility stands together with the use of nuclear weapons.

In the Final Document of 2010 NPT Review Conference, the Conference expressed “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons.” If this means that the conference including Nuclear Weapons States finds that any use of nuclear weapons has always catastrophic humanitarian consequences, we can ask NWSs and their allies to demonstrate the existence of military necessity of use of nuclear weapons balanced to the catastrophic humanitarian consequences. Is there such a military necessity in the real world?

The second point is the political ambiguity on the nuclear weapons policies of NWSs and their allies.¹⁷ They do not explain precisely when, how, to which targets and in which circumstances they will use nuclear weapons. These attitudes allow them to avoid their accountability to apply IHL to possible use of the weapons.

Japanese government also has maintained the same attitude. In the Diet debate on the written statements to the ICJ, government officials stated that interpretation of International Law is one thing; the policy of deterrence is another.¹⁸ It is clear that Japanese government avoided applying IHL to possible use of nuclear weapons. Nuclear abolition movements in Japan have much evidence that shows the inhumanity of use of nuclear weapons. For example, recently lawsuits for certification of atomic bomb sickness in Japanese Courts have clarified that radiation effects of atomic

¹⁶ For “military advantage” in the context of proportionality in attack, see ICRC, *Customary International Humanitarian Law*, vol. I, Cambridge UP., 2005, pp. 49-50, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14. For “military necessity” in the context of “unnecessary suffering”, see *ibid*, pp.240-241, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70.

¹⁷ For example, on “calculated ambiguity”, see Morton H. Halperin, “The Role of Nuclear Weapons in the 21st Century,” in International Symposium on Security Affairs 2009, pp. 11-12, available at http://www.nids.go.jp/english/event/symposium/pdf/2009/e_01.pdf.

¹⁸ For example, statement of Director General Tanba, at Budget Committee, the House of Councilors, on June 23, 1994.

bombs in Hiroshima and Nagasaki is larger and longer than the claim of Japanese Government. In response to this result, the government drastically changed its approach to the certification of atomic bomb sickness.¹⁹ In January 2011, Japan announced its willingness to participate in the discussion on a nuclear weapons convention in the CD.²⁰ But its security policy depending on the US nuclear extended deterrence is not changed: “[A]s long as nuclear weapons exist, the extended deterrence provided by the United States, with nuclear deterrent as a vital element, will be indispensable.”²¹ We need a concrete and robust strategy to overcome the political ambiguity in order to ensure to apply IHL to the use of nuclear weapons.

The IHL commitment has great potential to circumvent the policy of nuclear deterrence. It allows us to ask NWSs and their allies to clarify the contents of “military necessity” which makes nuclear weapons “necessary evil”. To demonstrate no military necessity balanced to “the catastrophic humanitarian consequences” in this real world would enable us to see nuclear weapons as “absolute evil”. We need to make the IHL commitment stronger and to improve our skill to use it.

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¹⁹ See, Tetsuro Miyahara, “Facts Revealed by Joint Suits for Certification of Atomic Bomb Sickness,” *NPT 2010 Review Conference Report*, available at http://www.hankaku-j.org/data/jalana/npt_005_en.html and Masayoshi Naito, “Nuclear Weapons Seen from the Perspective of the Damage Caused by the Atomic Bombings: A Proposal for the Elimination of Nuclear Weapons,” *ibid.*, available at http://www.hankaku-j.org/data/jalana/npt_006_en.html.

²⁰ “Besides this issue of a specific FMCT treaty, Japan is willing to participate in discussions, with a longer perspective, on how a multilateral nuclear disarmament framework or a nuclear weapons convention, as it is often referred to, should look like in the final phase of nuclear disarmament.” Statement of Japan, Ambassador Suda, 27 January 2011, available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/F0E19879B76F7889C125782500501A13/\\$file/Japan_1200.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/F0E19879B76F7889C125782500501A13/$file/Japan_1200.pdf).

²¹ See, “NATIONAL DEFENSE PROGRAM GUIDELINES for FY 2011 and beyond,” approved by the Security Council and the Cabinet on December 17, 2010, p. 2, available at http://www.mod.go.jp/e/d_act/d_policy/pdf/guidelinesFY2011.pdf.