The Historical Significance of the Shimoda Case Judgment, in View of the Evolution of International Humanitarian Law

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Introduction

On December 7, 1963 Tokyo District Court handed down a decision (the Shimoda Case judgment[1]) which ruled that the atomic bombings of Hiroshima and Nagasaki violated international law. This lawsuit (known internationally as the Shimoda Case) was filed by Ryuichi Shimoda and four other plaintiffs who were victims of the Hiroshima and Nagasaki bombings seeking compensation on the assumption that the bombings were illegal. Although the Court rejected their demand for compensation, it determined that the bombings were illegal in light of the principles of contemporary positive international law.

This paper places the Shimoda Case within the subsequent evolution in international law — particularly the advance from the "laws of war," under which the benefit of the law is assured equally for all belligerents, to international humanitarian law, whose focus is on protecting individual victims of war — and examines its historical significance.

I. Major Considerations in Assessing the Shimoda Case

1. Basic Issues in Assessing the Use of Nuclear Weapons According to International Law

The Shimoda Case judged the legality of the Hiroshima and Nagasaki atomic bombings under international law, and internationally it was also the first judicial decision on the use of nuclear weapons. Roughly there are two issues: First, whether international law applies to the use of new weapons for which there is no express prohibition, and second, whether the atomic bombings can be declared illegal based on two principles of the laws of war, i.e., doctrine of military objectives (principle of distinction) and banning the use of weapons which cause unnecessary suffering.

In view of the fact that the 1996 ICJ Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons (below, Advisory Opinion) also takes up these issues, the historical significance of the Shimoda Case judgment transcended the specific instance of the Hiroshima and Nagasaki atomic bombings, and presented an international law rationale that is applicable to the use of nuclear weapons in general.

In recent years the inhumaneness of nuclear weapons has come into the spotlight as a nuclear weapons abolition strategy. Let us examine the Shimoda Case judgment in

[1] An English translation of the verdict is available on the website of the International Committee of the Red Cross.
https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/aa559087dbcf1af5c1256a1c0029f14d

this respect.

2. Confirming the Application of International Law to the Use of Nuclear Weapons: Negating the Argument that It Does Not Apply to New Weapons

At times when new weapons appear, there is of course no customary law that specifically bans them, and also no treaties. Additionally, there is a strong traditional argument that it is permitted to use weapons which are not specifically banned by international law, and this claim is also made for nuclear weapons.

On this issue, the judgment states: “The rules contained in these instruments do not include any provisions directly touching upon the atomic bomb, a new weapon which appeared during the Second World War. On the strength of this fact, the defendant State argues that the question of violation of positive international law cannot arise, since the use of an atomic bomb was not expressly prohibited by positive international law inasmuch as there was neither a customary rule of international law nor treaty law-prohibiting its use at that time.

“It can naturally be assumed that the use of a new weapon is legal as long as international law does not prohibit it. However, the prohibition in this context is to be understood to include not only the case where there is an express rule of direct prohibition, but also the case where the prohibition can be implied *de plano* from the interpretation and application by analogy of existing rules of international law (customary international law and treaties).”

The judgment held that it is possible to apply interpretation and application by analogy of existing customary law and treaties, and the rules of international law that underpin them.

3. Assessment from Two Principles of the Laws of War

(1) Doctrine of Military Objectives (“Principle of Distinction”)

The decision judged that, “according to the customary rules generally recognized in international law concerning hostile acts, there is a distinction between a defended city and an undefended city” with regard to bombardment by land and naval forces, and that with regard to aerial bombardment under the Draft Rules of Air Warfare (1923), “It can therefore be said that the prohibition of indiscriminate aerial bombardment of an undefended city and the principle of military objectives contained therein are rules of customary international law in view of the fact that these are also found in common in the rules of land and sea warfare.” Invoking this, the decision stated, “It is beyond dispute” that because Hiroshima and Nagasaki were undefended cities which, even though having defense facilities and military units, were far removed from battlefields and not in danger of being occupied by enemy forces, “Therefore, since an aerial bombardment with an atomic bomb brings the same result as a blind aerial bombardment from the tremendous power of destruction, even if the aerial bombardment has only a military objective as the target of its attack, it is proper to understand that an aerial bombardment with an atomic bomb on both cities of Hiroshima and Nagasaki was an illegal act of hostility as the indiscriminate aerial bombardment on undefended cities.”

Regarding the issue that no express related treaties exist, this decision based its

judgment on the doctrine of military objectives, a basic rule of the laws of war. In view of the fact that the subsequent Protocol I Additional to the Geneva Conventions of 1977 abolished the distinction between defended and undefended cities and fully applied the principle of distinction to both cases, this decision is commendable for its great contribution to the evolution of international humanitarian law.

(2) Prohibition of Weapons that Cause Unnecessary Suffering

The decision then invoked the 1868 St. Petersburg Declaration, which defines unnecessary suffering, and Article XXIII(e) of the Hague Regulations Respecting the Laws and Customs of War on Land, which provides for a ban on the use of weapons which cause unnecessary suffering, stating, "It is indeed a fact to be regretted that the atomic bombing of the cities of Hiroshima and Nagasaki took away the lives of tens of thousands of citizens, and that among those who have survived are those whose lives are still imperiled owing to its radioactive effects even now after eighteen years," and that in light of this "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 which prohibits the causing of unnecessary suffering." Calling attention to this point as well endows the Shimoda Case judgment with great significance.

4. Inhumaneness as an Assessment Criterion

Underlying the judgment that the atomic bombings of Hiroshima and Nagasaki violate international law was the recognition of the inhumaneness and cruelty of atomic bombs. Although the decision did not make a direct finding of fact on the state of harm from the Hiroshima and Nagasaki bombings, in concluding that "the atomic bombs have characteristics which differ from all conventional weapons, and must be said that they are truly cruel weapons," it stated that "we have already observed the horror of the many kinds of physical damage" arising from the characteristic radiation of the atomic bombs. The decision concluded that the atomic bombs were inhumane based on the severe damage they caused, which is public knowledge in Japan.

II. Evolution of International Humanitarian Law and the Use of Nuclear Weapons

1. From the Laws of War to International Humanitarian Law: Shift in the Benefit of the Law

In response to Resolution XXIII, "Human rights in armed conflicts," of the International Conference on Human Rights, Teheran, which was held to commemorate the 20th anniversary in 1968 of the Universal Declaration of Human Rights, the UN General Assembly took up the matter of "Respect for Human Rights in Armed Conflicts," which started the legislative process of international humanitarian law that led to adoption of the Protocol I Additional to the Geneva Conventions of 1977.

Under the prohibition of use of force by the UN Charter, doubts arose in international humanitarian law about equality in the benefit of the law between aggressors and aggression victims, but benefit of the law is still upheld for protection of

individual victims of armed conflict.

Further, in recent times we have come to see a phenomenon which might be called the mutual permeation of international human rights law and international humanitarian law, and the world has adopted the view that protection under human rights conventions is not suspended even in times of armed conflict, except in special cases. One must keep such changes in mind when considering the application of humanitarian law to nuclear weapons use.

2. Protocol I Additional to the Geneva Conventions of 1977 and the Use of Nuclear Weapons

(1) Rigorous Observance of the Distinction Principle (Doctrine of Military Objectives): Articles 48–58

Additional Protocol I provides that "The civilian population as such, as well as individual civilians, shall not be the object of attack" (Article 51.2) and "Attacks shall be limited strictly to military objectives" (Article 52.2), and it unconditionally prohibits indiscriminate attacks (Article 51.4). The stance adopted here discarded the concept of defended and undefended cities in the traditional laws of war, upon which the Shimoda decision is based; instead, it applies the doctrine of military objectives, i.e., the principle of distinction, to all situations.

Considering together Article 51.4, which defines indiscriminate attacks, Article 54, whose intent is to reinforce civilian protections, Article 56, and others, there is no scope at all for the use of nuclear weapons to be legal under the Protocol.

(2) Reconfirmed Prohibition of Weapons that Cause Unnecessary Suffering: Articles 35 and 36

The protocol reconfirms the ban on weapons that cause unnecessary suffering in Article 35.2. This provision being a general rule, does it not apply to the use of nuclear weapons, for which there is no specific prohibition? But Paragraph 2 of the Protocol's Article 1, "General principles and scope of application," sets forth the Martens Clause by stating, "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Therefore, if one reads the ban on weapons which cause unnecessary suffering, set forth in Article 35 Paragraphs 1 and 2, in conjunction with the Martens Clause in Article 1.2, it is clear that the prohibition applies also to the use of nuclear weapons.

(3) Protection of the Natural Environment: Articles 35.3 and 55

The Protocol incorporates the element of protecting the natural environment. Article 35.3 prohibits using methods and means of warfare "which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment," while Article 55.1 requires taking care to protect the natural environment against such damage, and prohibits the use of warfare methods and means "which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." These articles are written in a way which strongly suggests that the anticipated environmental damage would not

be caused by conventional weapons, but by weapons of mass destruction such as nuclear weapons.

3. Use of Nuclear Weapons as a War Crime: Rome Statute of the International Criminal Court, Article 8.2(b)(xx)

For many years there was no mechanism for implementing the argument that the use of nuclear weapons constitutes a crime against humanity or is a war crime, but the entry into force of the Rome Statute of the International Criminal Court (ICC) in 2002 created an avenue for such a possibility. Article 8.2(b)(xx) of the Statute, "Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict," builds on Article 35.2 of Additional Protocol I, and although it does not specify nuclear weapons, it can be read as a provision which assumes the use of nuclear weapons.

In the past, it was argued on the political-movement level that using nuclear weapons is a war crime, but now this is argued on the level of interpreting the Rome Statute, which is positive law. This fact clearly shows progress in the debate.

III. ICJ Advisory Opinion on the "Legality of Threat or Use of Nuclear Weapons"

1. Opinion Framework

The UN General Assembly sought an Advisory Opinion from the ICJ on the question, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" In Dispositif (1) the ICJ decided to respond to the request for an Advisory Opinion, and in Dispositif (2) it examined the issue of legality or illegality.

In Dispositif (2) A through E the Court confirmed that there is no authorization in particular for the threat or use of nuclear weapons, nor is there any comprehensive and universal prohibition therefor, and went on to state that the threat or use of any kind of weapon is illegal if it violates Article 2.4 of the UN Charter and does not fulfill the requirements of Article 51, and that whether or not the possession of nuclear arms for deterrence corresponds to the "threat" in Article 2.4 of the Charter depends on whether the assumed use of force is prohibited by the article and, if for the purpose of self-defense, whether it violates the principles of necessity and proportionality.

The Court, having found that there are no treaty rules or customary rules which specifically prohibit the threat or use of nuclear weapons themselves, then moved ahead with a discussion of whether they are illegal in light of the principles and rules of international humanitarian law, and in Dispositif (2)E ruled that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However… the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."

As the basic principles of international humanitarian law which should be the criteria for judging illegality, the Court here cites, first, the principle of distinction,

which prohibits indiscriminate attacks, and second, the principle banning weapons which cause unnecessary suffering. The Court then refers to the Martens Clause, and states that it "has proved to be an effective means of addressing the rapid evolution of military technology." The Court goes on to state that most of the rules of humanitarian law are very fundamental to the respect of human individuals and "elementary considerations of humanity," and that the rules "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law," thereby recognizing that the basic rules of international humanitarian law bind all countries as customary law.

One must take note of the facts that, in applying the basic principles of humanitarian law to nuclear weapons, the Court produced a detailed finding on "the unique characteristics of nuclear weapons," that is, their inhumanness, and that it repeatedly emphasizes the "intrinsically humanitarian character" of international humanitarian law.

2. Assessment of the Advisory Opinion from Two Principles of International Humanitarian Law

(1) Assessment of Nuclear Weapons According to Humanitarian Law: Opinion Dispositif (2) E, First Half

However, while the Court itself recognized the inhumaneness of nuclear weapons, it is hard to understand the expression suggestive of exceptions, arrived at as a result of applying the basic principles of humanitarian law to their use, that it "would generally be contrary to the rules of international law." Moreover, on this point the Court offers no concrete justification. It is more than evident that the use of nuclear weapons corresponds to indiscriminate attacks, which violate the distinction principle, and that they cause unnecessary suffering. To give no justification in spite of that was perhaps a last-ditch measure to avoid such an inevitable conclusion, open the way to an "exception," and narrowly secure a majority of judges in favor.

What kind of "exceptions" are possible? The only possibility quoted by the opinion was that the use of low-yield nuclear weapons against warships at sea or troops in sparsely populated areas would have little secondary damage on civilians, which was argued by the UK and US. But even if this can be an exception to the distinction principle, it is not an exception to the ban on the use of weapons that cause unnecessary suffering. Even more of a problem is that the Court turned a blind eye to the Martens Clause, which the Court itself positively assessed as an "expression of the pre-existing customary law," and conducted no specific consideration at all of the possibility of applying to nuclear weapons the basic principle of banning weapons which cause unnecessary suffering.

(2) Argument on the Right of Self-Defense: Opinion Dispositif (2) E, Second Half

As a possible exception, the Advisory Opinion suggested "an extreme circumstance of self-defense, in which the very survival of a State would be at stake," but the matter of whether a certain use of force fulfills the requirement for self-defense is on the level of the judgment of whether it can be justified in light of the UN Charter and the law of self-defense, and if this is determined satisfy conditions, then next is the consideration of whether, in light of law applicable to armed conflict, there are violations involving the nature of the weapons or how they are used. Therefore, satisfaction of the conditions

for self-defense is not a reason for precluding the illegality of means and methods of warfare that violate the basic principles of humanitarian law. Here the Court committed a major contradiction in logic.

3. Obligation to Pursue in Good Faith and Bring to a Conclusion Negotiations Leading to Nuclear Disarmament: Opinion Dispositif (2) F

Finally, the Court stated, "F. There exists an obligation to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control." Paragraph F does not correspond to the question set forth by the UN General Assembly, and as such arguably is ultra vires of the Court, but there is great significance in the fact that in the end the judges use this judgment to unanimously conclude their opinion, in which the Court had harshly clashed. This is certainly because the Court thought that the continued difference of opinion over the legal status of devastating weapons such as nuclear weapons would be harmful to international law and the stability of the international order.

Moreover, while at first glance this obligation appears to be a restatement of the NPT's Article 6, it is not just an obligation for mere negotiations; in that the Court recognizes this as evolving this obligation into an obligation to achieve total nuclear disarmament by concluding negotiations in good faith, and that this dual obligation involves not only the 182 NPT parties, but demands the cooperation of all nations in the realistic pursuit of total and complete disarmament, especially nuclear disarmament, the Court arguably advances the existing discussion a step further.

Conclusion

During the 30-odd years between the Shimoda Case and the ICJ Advisory Opinion, the traditional laws of war that applied in the former evolved into international humanitarian law, as symbolized by Protocol I Additional to the Geneva Conventions of 1977. Under the laws of war, assuring the equality of belligerents was the main benefit of the law, but under international humanitarian law, the main benefit of the law is assuring the human rights and humane treatment of individuals, who are the victims of armed conflict, based on "elementary considerations of humanity." The Shimoda Case judgment beautifully predicted this evolution of international law. In particular, it affirmed the application of the existing laws of war to the dropping of the atomic bombs, which were new weapons, and it rendered judgment on the legality of these new weapons based on the basic principles of the laws of war, i.e., the doctrine of military objectives (the distinction principle) and the ban on weapons that cause unnecessary suffering, which underscored the historical significance of the Shimoda decision in the sense that it provided a model that should be used when assessing the use of nuclear weapons under international law. Although the Advisory Opinion does not directly quote the Shimoda decision, that decision — known internationally as the "Shimoda Case" — had been published in English translation, and it seems likely that the ICJ judges had read the judgment. The Advisory Opinion in general follows the Shimoda judgment model.

Let us examine the extent to which the Advisory Opinion, which builds on the establishment of international humanitarian law, advanced the Shimoda judgment

stance toward banning the use of nuclear weapons and abolishing them. Above I pointed out the Advisory Opinion's problems, but it doubtless has several positive facets as well. The opinion put an end to the argument, which had persisted among nuclear-weapons powers and their academics, that the existing laws of war and humanitarian law do not apply to the use of nuclear weapons, which are a new type. The ICJ Advisory Opinion also emphasized the inhumaneness of nuclear weapons, underscored the humane character of international humanitarian law, and recognized that the use of nuclear weapons is "scarcely reconcilable" with the principles and rules of humanitarian law.

The Advisory Opinion's stumbling block was the argument for self-defense and the doctrine of nuclear deterrence which underlies it. One reason that the Court in the dispositif abandoned a judgment on the legality or illegality of using nuclear weapons in an "extreme circumstance of self-defense" was that it could not ignore the customary use of deterrence policy, to which "an appreciable section of the international community" had adhered to many years. Accordingly, overcoming nuclear deterrence doctrine is essential to confirm the total illegality of using nuclear weapons.

Overcoming nuclear deterrence doctrine also necessitates the establishment of a new view of security — a "human-security" view — that aims to guarantee the individual's right to live in peace. This would replace the traditional military-security view, which is based on the country. Nuclear deterrence doctrine is rooted in the most extreme inhumane thinking, in which another country's entire populace is held hostage for the "security" of one's own country. In this sense, deterrence is not only a contrary concept of international humanitarian law, but also a contrary concept of "human security."

Establishing the "human-security" view and overcoming nuclear deterrence doctrine requires the use of realpolitik, and both domestic and foreign public opinion play a major role in doing that, as shown by the Shimoda Case and the ICJ Advisory Opinion. It is well known that behind the Shimoda decision was the Campaign against Atomic and Hydrogen Bombs, which experienced a groundswell in the wake of the 1954 *Daigo Fukuryu Maru* (*Lucky Dragon No. 5*) incident, and that underlying the UN General Assembly resolution that sought the ICJ Advisory Opinion were the activities of the World Court Project, which was affiliated with the International Association of Lawyers Against Nuclear Arms (IALANA) and many other anti-nuclear NGOs. These anti-nuclear NGOs had significant influence over the ICJ's advisory proceedings, and it was an achievement of this campaign that the mayors of Hiroshima and Nagasaki, whose views differed from those of the Japanese government, participated in oral statements from Japan oral statements, which was highly unusual.

The heightening of humanitarian consciousness among the citizens based on the tragic experience of war has always underlain the advance from the laws of war to international humanitarian law. This advance was brought about mainly against the backdrop of the heightening of humanitarian consciousness among the citizens and the strength of the movement supported by it. There is no expectation that the "obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects" confirmed by the Advisory Opinion would ever be discharged if it were left entirely up to the governments of nuclear-weapon states and other countries. Even though the UN General Assembly has time and again passed resolutions to quickly initiate negotiations to abolish nuclear weapons, they have yet to begin, and this fact shows that we cannot expect any progress on the inter-state level

alone. Perhaps the only way to overcome this difficulty is the strength of international public opinion marshaled by the anti-nuclear movement. In other words, the anti-nuclear movement passed the ball to the ICJ, and the ICJ in effect threw it back. Surely now the true value of the anti-nuclear movement is being tested.

This paper is a summary produced by the secretariat of a keynote speech delivered at the Memorial Symposium for the 50th Anniversary of the Shimoda Case Judgment, which was hosted by the Japan Association of Lawyers Against Nuclear Arms on December 8, 2013 in Tokyo