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Humanitarian Approach to Nuclear Disarmament and the Marshall Islands Cases

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要旨

2015年は広島・長崎への原爆投下から70年の節目であった。今日でもなお核兵器は存在し続けており、国際社会における脅威となっている。同年核不拡散条約の第9回再検討会議が開催されたが、具体的成果を得ることなく閉幕した。その背景には2010年の第8回再検討会議のころから主張され始めた核軍縮への人道的アプローチをめぐる核兵器国と非核兵器国との厳しい対立がある。この対立は2015年後半の国連総会第1委員会における核軍縮関連諸決議の採択をめぐる顕在化した。2016年には国連総会の下に設置された核軍縮に関するオープンエンド作業部会(OEWG)において、核兵器禁止条約を追求する議論が提起されており、これをめぐり非核兵器国と核兵器依存国との主張の対立がみられる。

本稿は、この人道的アプローチに基づく核兵器禁止条約の追求の在り方につき現行の国際法の観点から考察を行っている。第1部では生物兵器禁止条約や化学兵器禁止条約の教訓から核兵器禁止条約形成においても人道の主張に基づく条約形成が有効であることを論じるとともに、現行法を再確認する規定が必要であることを主張している。第2部では国際司法裁判所に係属中のマーシャル諸島による核軍縮義務に関する訴訟が現在の核兵器禁止条約を追求する議論に対して有するいくつかの含意につき論じている。

Introduction

Last year, 2015, marked 70 years since the atomic bombings, the end of World War II, and the launching of the United Nations. Although we have also seen more than seven decades in which nuclear weapons were not used, those weapons still exist and continue to threaten humanity. In the same year, notwithstanding, the Ninth Review Conference of the Nuclear Nonproliferation Treaty (NPT) ended without any substantive result.

The purpose of this paper is to review the current state of arguments regarding nuclear disarmament, and examine ways to further it. Part I focuses on the humanitarian approach to nuclear disarmament, which is advocated by some civil society groups and states since 2010 NPT Review Conference. Part II considers significance of the Marshall Islands Cases, which was initiated by the Republic of the Marshall Islands (RMI) at the International Court of Justice (ICJ) in 2014.¹

¹ This paper is based on my articles that already have been published in *Japanese Lawyers' Recommendations for the 2015 NPT Review Conference*, April/May 2015, Japan Association of Lawyers Against Nuclear Arms (JALANA), pp. 6-10 (as for Part I), and *JALANA Report to the 2016 IALANA General Assembly*, April 2016, JALANA, pp. 13-16 (as for Part II), both of which you find out on the website of JALANA (<http://www.hankaku-j.org/>).

Part I. Striving Toward Nuclear Disarmament, and the Humanitarian Approach

1. The Obligation for Nuclear Disarmament

The NPT, which last year marked its 45th year since entry into force, provides the legal basis for nuclear disarmament in Article VI. In 1995 after the Cold War, the NPT was extended indefinitely, and in conjunction with that, it has been repeatedly confirmed that Article VI legally requires the abolition of nuclear weapons. According to the 1995 decision “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” the following measure is important “in the full realization and effective implementation of article VI”: “[t]he determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons.”² In the 2000 Final Documents, the Conference agreed on “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.”³ In the 2010 Final Document, “[i]n pursuit of the full, effective and urgent implementation of article VI of [the NPT]”, the Conference agreed on 64 Action Plans on nuclear disarmament which includes concrete steps “for the total elimination of nuclear weapons.”⁴ In the 1996 Advisory Opinion, the ICJ also held that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”⁵

Performance of this obligation for nuclear disarmament has still made no progress. In 2014 the RMI filed suit in the ICJ over this issue, and non-nuclear weapons states are becoming increasingly frustrated with the delay in nuclear disarmament.⁶

2. The Humanitarian Approach

In relation to the disarmament effort, starting with the 2010 Review Conference the involved parties have widely discussed and strived toward the humanitarian approach to nuclear disarmament. So far, seven joint statements have been issued, and three international conferences have been held on this matter.⁷ The Final Document from the 2010 Review Conference stated, “The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for

2 See NPT/CONF.1995/32 (Part I), Annex, Decision 2, para. 4.

3 See NPT/CONF.2000/28 (Parts I and II), p. 14, para. 6.

4 See NPT/CONF.2010/50 (Vol. I), p. 19.

5 See *ICJ Reports 1996*, p. 267, para. 105(2) F.

6 This frustration is also recognized by nuclear weapons states. For instance see the statement by a representative of the UK to the 3rd PrepCom of the 2015 NPT RevConf, on 28 April 2014.

7 First statement was issued by Switzerland on behalf of 16 states at the 1st PrepCom on 2 May 2012, the second by Switzerland on behalf of 35 states at the UNGA 1st Committee on 22 October 2012, the third by South Africa on behalf of 80 states at the 2nd PrepCom on 24 April 2013, the fourth by New Zealand on behalf of 124 states and Holly See at the UNGA 1st Committee on 21 October 2013, the fifth by New Zealand on behalf of 155 states, Holly See and Palestine at the UNGA 1st Committee on 20 October 2014, the sixth by Austria on behalf of 159 states at the Ninth NPT RevConf on 28 April 2015 and the seventh was adapted as the UNGA Resolution 70/47 by 144/18/22 on 7 December 2015. As International Conferences on humanitarian impact of nuclear weapons, the first Oslo conference was held in March 2013, the second Nayarit in February 2014 and the third Vienna in December 2014.

all States at all times to comply with applicable international law, including international humanitarian law.”⁸ The joint statements shared these elements: the importance that nuclear weapons are never used again under any circumstances, in view of the devastating consequences of their use, and the realization that the only way to guarantee that nuclear weapons will never be used again is through their total elimination. At the three international conferences there was also a fact-based, profound recognition of the humanitarian consequences of using nuclear weapons, and it was emphasized that if nuclear weapons were used, humanitarian relief would be impossible. At the 2014 Vienna conference, participants shared a recognition of the current status regarding laws related to nuclear weapons use.⁹

It is commendable that, thanks to this approach, efforts for nuclear disarmament are once again gaining traction.

There is, however, a counterargument from the standpoint of security. The 2010 Review Conference Final Document also said, “The Conference reaffirms that significant steps by all the nuclear-weapon States leading to nuclear disarmament should promote international stability, peace and security, and be based on the principle of increased and undiminished security for all.”¹⁰ A joint statement submitted by Australia to the 2014 UN General Assembly First Committee stated, “To create the conditions that would facilitate further major reductions in nuclear arsenals and eventually eliminate them requires the global community to cooperate to address the important *security* and humanitarian dimensions of nuclear weapons” (emphasis added).¹¹

Debate has not necessarily produced agreement on any specific plan for abolishing nuclear weapons (as of this writing, the 2016 OEWG is going on). The New Agenda Coalition’s proposal is not specific but general, and the ban treaty advocated by the International Campaign to Abolish Nuclear Weapons (ICAN) is now getting attentions from a number of states.¹² The chair’s summary from the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico, said that the “time has come to initiate a diplomatic process conducive to this goal,” and further made mention of the firm belief that “this process should comprise a specific timeframe, the definition of the most appropriate fora, and a clear and substantive framework.”¹³ But the Austrian/Humanitarian Pledge released at the subsequent Vienna conference merely called on all states parties to the NPT “to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.”¹⁴

8 See *supra* note 4, p. 19.

9 See NPT/CONF.2015/WP.29, p. 3/5, para. 4(g).

10 See *supra* note 4, p. 19.

11 See A/C.1/69/PV.11, p. 11/32.

12 NAC has consistently advocated for, comprising the mutually reinforcing components, implemented in an unconditional manner and backed by clearly defined timelines, benchmarks and a strong system of verification (see NPT/CONF.2015/PC.III/WP.25, para. 28.). Since the 2014 NPT PrepCom, it has provided with several options for a world without nuclear weapons (see NPT/CONF.2015/PC.III/WP.18, para. 29.).

As for a treaty banning or prohibiting nuclear weapons, some states have issued working papers supporting it during the 2016 OEWG (for example, A/AC.286/WP.14 submitted by Fiji, Nauru, Palau, Samoa and Tuvalu, A/AC.286/WP.15 submitted by the Community of Latin American and Caribbean states (CELAC), A/AC.286/WP.17 submitted by Mexico, A/AC.286/WP.27 submitted by Nicaragua, and A/AC.286/WP.34 submitted by Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Indonesia, Malaysia, Mexico and Zambia.).

13 See NPT/CONF.2015/PC.III/WP.35, para. 15.

14 See *supra* note 9, p. 4, para. 3.

3. From the Illegality of Using Weapons to Their Abolition

Let's take a look at past examples of transitioning from making weapons use illegal to abolishing them. In the disarmament field, abolition of a certain category of weapons has been achieved by using specific legal instruments. In many cases the use of weapons has been restricted or banned, which is then followed by a ban on their possession, and abolition. If we take biological and chemical weapons as examples, in 1925 the Geneva Gas Protocol was concluded, banning the use of poison gas and other weapons. This was followed by conventions which banned possession and made provisions for abolition (the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention).

We can learn the following lessons from these examples.

First, countries possessing the weapons ultimately must resolve to get rid of them, and for the most part this decision has been brought about by participation in an abolition convention.

Second, as an antecedent to an abolition convention, there have been norms which restrict or ban the use of the weapon in question. One can regard these antecedent restriction and prohibition norms as having ushered in the subsequent abolition treaties.

Third, there is nevertheless a legal gap between the norms restricting and banning use, and the abolition treaties. The former have not entirely restricted or banned the use of the weapons in question. With the Geneva Gas Protocol, for example, some countries made a reservation on prohibiting use based on reprisal.¹⁵ Therefore norms restricting or banning use cannot alone assure the weapons will not be used, which necessitates abolition treaties.

Fourth, it was the requirement of humanity that closed this legal gap. The 1972 Biological Weapons Convention refers to the "conscience of mankind" in its preamble. The 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions both show in each preamble that its conclusion is based on the interpretation and application of international humanitarian law (IHL), which emphasizes the requirement of humanity.¹⁶ It is significant that security is also given consideration, but that this was overcome and the conventions were concluded.

4. How about Nuclear Disarmament?

First, there is still no convention for abolishing nuclear weapons. Although it has been proposed, the nuclear-weapon states make no effort to seriously consider it. Since 1996 the UN General Assembly has called upon all States to "[commence] multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination".¹⁷ But any nuclear weapons state has not moved to commence the negotiations.

¹⁵ For example, US, UK, China and DPRK have reserved their right to use the weapon in reprisal.

¹⁶ The 1980 Convention on Certain Conventional Weapons also refers to principles of International Humanitarian Law, and especially the Martens Clause in its preamble, though it is not an abolition convention of the certain conventional weapons.

¹⁷ The latest version of this resolution is the General Assembly Resolution 70/56, entitled "Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", adopted on 7 December 2015.

Second, there are nevertheless legal norms for restricting and banning the threat and use of nuclear weapons. Although the ICJ Advisory Opinion did confirm the general illegality of the threat or use of nuclear weapons mainly on the basis of IHL, it avoided coming to a definitive conclusion on their legality “in an extreme circumstance of self-defense.” This does not mean there is no applicable law; existing law was insufficiently applied.¹⁸ At present, therefore, the issue between those who argue legality and those who argue illegality is how to interpret and apply the law. Whether such law exists or not is not the issue.

Third, there is accordingly a kind of “legal gap” between norms that restrict or ban use, and abolition conventions in the above meaning.¹⁹ As the situation now stands, an abolition convention is essential to assure that nuclear weapons will never be used again.

Fourth, there is now an initiative to strengthen the requirement of humanity for closing the legal gap, and that is the humanitarian approach noted above.²⁰ There are expectations for the role of the requirement of humanity, which is a set of social norms. This is expressed as the views of nations, international organizations, and civil society. At the same time, however, there is a counterargument from the viewpoint of security, and that has yet to be overcome.

5. What should we do now?

First, we need to stay on message: The use of nuclear weapons is illegal. At issue is the law’s application, but inasmuch as we cannot have full expectations for a solution of the issue in the ICJ or other court at present, we must constantly assert the illegality of nuclear weapons use in every venue of international community. Here the International Committee of the Red Cross as the guardian of IHL, and the Red Cross and Red Crescent Movement, have major roles to play.²¹

Next we need to obtain broad-based support for the humanitarian approach and stigmatize nuclear weapons. This provides the power to close the legal gap. It is important here to condemn the use and threat of nuclear weapons on the basis of what we know as fact about the consequences of nuclear explosions. Doing so will encourage a reconsideration of nuclear-dependent security, i.e., the doctrine of nuclear deterrence.²²

18 See Said Mahmoudi, “The International Court of Justice and Nuclear Weapons”, *Nordic Journal of International Law*, vol. 66, no. 1, 1997, pp. 94-95, and as for the 1996 Advisory Opinion generally, see *Völkerrechtliche Pflicht zur nuklearen Abrüstung? = Legal obligation to nuclear disarmament? = L’obligation de désarmement nucléaire?*, Mohammed Bedjaoui, et als., Norderstedt: Books on Demand, 2009, pp. 81-175.

19 See John Burroughs and Peter Weiss, “Legal Gap or Compliance Gap?” *Arms Control Today*, October 2015, available at http://www.armscontrol.org/ACT/2015_10/Letter-to-the-Editor/Legal%20Gap%20or%20Compliance%20Gap, last visited on 12 May 2016.

20 See *supra* note 14.

21 See Statement by Jakob Kellenberger, President of the ICRC, to the Geneva Diplomatic Corps, Geneva, 20 April 2010, available at <https://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm>, last visited on May 8, 2016, and Resolution 1 of the Council of Delegates of the Red Cross and Red Crescent Movement, Geneva, 26 November 2011, in *31st International Conference of the Red Cross and Red Crescent Geneva, 28 November - 1 December 2011, Council of Delegates of the International Red Cross and Red Crescent Movement Geneva, 26 November 2011, Resolutions*, pp.5-6.

22 As for the Humanitarian Approach see John Borrie and Tim Caughley, *Viewing Nuclear Weapons through a Humanitarian Lens*, UNIDIR, 2013, pp. 7-8, and A Working Paper submitted by Austria to the 2016 OEWG “aims to examine the notion of the security provided by nuclear weapons and nuclear deterrence from the perspective of the humanitarian initiative” (A/AC.286/WP.4).

From the stance of the humanitarian approach, we should doggedly make an issue of the very inhumaneness of the threat of nuclear weapons (i.e., nuclear deterrence). That in turn requires us to further the quest for and deepen understanding of the principle of humanity, and to broadly share the profound understanding obtained thereby.²³

In connection with this, by way of an approach from the perspective of disarmament law, it is perhaps important to have the viewpoint that a nuclear deterrence posture itself in some ways hinders nuclear disarmament negotiations. One can indeed argue that the very maintenance of a nuclear deterrence posture not only violates the obligation under NPT Article VI to stop the nuclear arms race at an early date, but also violates the obligation to pursue nuclear disarmament negotiations in good faith and bring them to a conclusion. On this point, it is worth watching the Marshall Islands Cases, in which the obligation for nuclear disarmament is at issue.²⁴

Last comes starting a debate on specific initiatives aimed at an abolition convention. It is perhaps not exactly necessary to add new articles that prohibit the use of nuclear weapons, because there exist already principles and rules which prohibit the use. The presence of such provisions in the abolition convention might keep nuclear-weapon states from participating in negotiations on the convention. And if nuclear-weapon states indicate that they will not participate in the convention with such provisions, that could give those states a pretext for arguing that there are no legal norms banning use, or that they do not need to apply the convention, because those provisions formally do not bind them and nuclear-weapons states perhaps could complain of and contest severe interpretation to fully apply International Humanitarian Law (IHL) to nuclear weapons.

By contrast, reaffirming the application of the principles and rules of IHL to nuclear weapons use in the abolition convention's preamble or other relevant provisions might make it possible to render a collective judgment on application of the law. Especially if a majority of countries participate, and the community of the State Parties to the convention comes to be regarded as representative of international community as a whole, such judgments might be seen as authoritative interpretations.²⁵

Further, in the event that nuclear-weapon states participate in negotiations leading to the abolition convention, one could expect that the posture of those states would build trust among the involved nations, so that, during the process of shaping the convention, the conditions under which nuclear-weapon states would accept rules totally banning use would be created.²⁶

23 For even more detail, see Part II, 3 in below.

24 See Part II, 1 in below.

25 In this context, it is worth noting that many disarmament conventions reaffirms existing norms of restricting or prohibiting the use of the weapons concerned. See the 1972 BWC, the 1993 CWC, the 1997 APLC and the 2008 CCM, and also see the preamble and article 2 of the 1980 CCW.

26 Recently some NATO states stated in a working paper at the 2016 OEWG that “[a]n early contribution to building trust and confidence would be a consensus on a broad and flexible “framework”, including political and legal measures, which should drive the disarmament process”, A/AC.286/WP.25, p. 3, para. 15.

Part II. Approaches to nuclear disarmament and the Marshall Islands cases

1. Current situation and background of the Marshall Islands cases

On 24 April 2014, the Republic of the Marshall Islands (RMI) filed lawsuits against nine nuclear armed states (China, DPRK, France, India, Israel, Pakistan, Russia, UK, and US) in the International Court of Justice (ICJ), accusing them of not fulfilling their obligations with respect to the cessation of the nuclear arms race at an early date, and to nuclear disarmament. The cases instituted by the RMI in the ICJ might help mitigate conflicts among the different approaches to nuclear disarmament. Procedures in these cases are now at the stage of determining jurisdiction and admissibility. If the cases proceed to the merits phase, they are expected to provide some guidance for negotiation relating to world nuclear disarmament.

A tiny island state in the North Pacific Ocean, the RMI is well known as a nuclear test site under US administration. Especially Bikini Atoll nuclear testing and the *Lucky Dragon No. 5* are deeply ingrained in the memories of the Japanese people. Under the Compact of Free Association with the US, the RMI has a close relationship to the US, which exercises strong leverage over it with respect to national defense and security. Nevertheless the RMI has sued nine nuclear weapons powers including the US at the ICJ. The claims are not based on RMI's own damage from nuclear tests, but on the defendants' violation of their obligations for nuclear disarmament under Article VI of the Nuclear Non-proliferation Treaty (NPT), to which the RMI is also a party. The plaintiff asks the court to adjudge and declare violations by the defendants, and to order them to take all steps necessary to comply with their obligations for nuclear disarmament. Procedures are now in progress for three cases in which defendants have accepted the ICJ's obligatory jurisdiction, i.e., the UK, Pakistan, and India, and public hearings at the procedural stage were held and concluded in March 2016. These three defendant states do not admit the jurisdiction of the court or admissibility of the Application. Judgements on the proceedings are supposed to be issued on these cases.

These lawsuits are supported by some civil society groups such as the International Association of Lawyers against Nuclear Arms (IALANA) and the Nuclear Age Peace Foundation against the backdrop of the stagnation of nuclear disarmament efforts. 2016 is the last year of President Obama's second term, and the United States presidential election year. In retrospect, at Prague in 2009 he actively proclaimed his resolve to seek a world without nuclear weapons and bring about nuclear disarmament, which brought him the Nobel Peace Prize later that same year. But how far has nuclear disarmament proceeded since then? Though the New START entered into force in 2011, negotiations for a much deeper weapons reduction have yet to start owing to confrontation between the US and Russia in recent years. The entry into force of the CTBT, to which Obama committed himself in Prague, has not been realized yet, and negotiations on a Fissile Material Cut-Off Treaty (FMCT) have yet to begin. In addition, nuclear powers are modernizing their nuclear weapons, which prolongs anxiety over nuclear proliferation. Terrorism is always a concern in connection with nuclear materials. In Japan's vicinity, the nuclear powers of the US, Russia, and China jostle against one another, and North Korea is now making nuclear weapons by means of repeated nuclear tests and missile launches.²⁷

27 As for study, analysis and evaluations of 36 countries' performance on nuclear disarmament, non-proliferation, and nuclear security in 2015, see *Hiroshima Report*, Hiroshima Prefecture, 2016.

Under international law, nuclear weapons states have an obligation to expedite nuclear disarmament. Article VI of the NPT provides an obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament. In fact, NPT Review Conferences held every five years are supposed to be the forum to review the implementation of that article. Although the 2010 review conference agreed on Action Plans²⁸ for the three pillars of the NPT — nuclear disarmament, non-proliferation, and peaceful use of nuclear energy — the 2015 conference failed to arrive at a consensus, and nothing substantial was achieved.²⁹

2. Different approaches among states to nuclear disarmament

For a long time, negotiating groups of states have been formed around issues of nuclear disarmament, and have competed with each other. Since the end of the Cold War, the step-by-step approach of nuclear weapons states and the comprehensive approach of the Non-aligned Movement states have polarized the debate on disarmament. Additionally, several new groups, for instance the New Agenda Coalition (NAC) and the Non-Proliferation and Disarmament Initiative (NPDI), have appeared and stand between the above two camps with the aim bridging the gap between them. At about the time of the 2010 NPT Review Conference, there appeared another approach that focuses on the humanitarian consequences of nuclear weapons use. This is the “humanitarian approach” advocated by civil society and academia. Now an increasing number of states support and promote this approach.³⁰

The 2015 NPT Review Conference ended without any concrete outcome. Now the approaches to nuclear disarmament, including those mentioned above, are in competition with each other. The common focus during the last Review cycle has been on “effective measures” relating to nuclear disarmament in Article VI of the NPT. The obligations concerning negotiations in good faith on effective measures relating to nuclear disarmament under that article are too vague to unite all the approaches asserted by different states with their differing interests.

3. Humanitarian approach to nuclear disarmament

Attention is now focused on how far this humanitarian approach can expedite nuclear disarmament. This approach attempts to apply the same method to nuclear disarmament that realized major success in other fields such as anti-personal landmines and cluster munitions. As mentioned above, it does not adopt the conventional viewpoint on security, but tries to stigmatize nuclear weapons by spotlighting the humanitarian suffering that they cause, thereby building a social norm for banning them, then elevating that to a legal norm. Some civil society groups insist on starting negotiations on a treaty banning the use and possession of nuclear weapons (BAN Treaty) even without the participation of nuclear weapons states. In the 2015 United Nations General Assembly, many resolutions based on this approach were proposed and adopted. On the basis of one resolution, Open-Ended Working Group (OEWG) meetings are going on in Geneva as a subsidiary body of the General Assembly. One of its mandates is to “substantively address concrete effective legal measures, legal provisions

28 See NPT/CONF.2010/50 (Vol. I).

29 See NPT/CONF.2015/50 (Part I).

30 See *supra* note 7.

and norms that would need to be concluded to attain and maintain a world without nuclear weapons.” In that context a Ban Treaty is supposed to be discussed as one of options.³¹

But the nuclear powers, especially the P5, are averse to the humanitarian approach. They opposed or abstained from the above UNGA resolutions. They unanimously opposed the resolution that established the OEWG. We cannot expect their attendance at those meetings.

4. Significance of the Marshall Islands Cases

Against that backdrop, I would like to point out the significance of the Marshall Islands Cases. First, they squarely question the interpretation of Article VI of the NPT. On the surface, the obligation under that article is not to achieve nuclear disarmament itself, but only to “pursue negotiations in good faith” on effective measures relating to nuclear disarmament. So there is ambiguity on the meaning of the article. But in 1996, the ICJ issued an Advisory Opinion on the legality of the threat or use of nuclear weapons, in which it held that there exists an obligation to pursue in good faith and “bring to a conclusion” negotiations leading to nuclear disarmament.³² Although there are many different views on this opinion, it suggests that the ICJ interprets Article VI as obligating the parties to achieve “a precise result” of nuclear disarmament.³³ Indeed the RMI asks the Court to clarify that point. Needless to say, the NPT is one of the most universal treaties in the world, and provides the only legal foundation to impose the obligation of nuclear disarmament on nuclear weapons states. A judicial reaffirmation in the Marshall Islands Cases that there exists an obligation to abolish nuclear weapons under the NPT would have great significance. In addition, the RMI argues that this is now customary international law, and in its lawsuits against the non-NPT nuclear powers India, Pakistan, Israel, and the DPRK, insists that they have the same obligation (currently two cases against India and Pakistan are in progress). If the customary nature of the obligation for nuclear abolition is recognized, it means the obligation is binding for all the states in the world, which would generate powerful momentum for the debate on nuclear disarmament.

Some people say that Ban is first and then Abolition is coming. It is true, I think. And Stigmatization of weapons by focusing on their humanitarian consequence is driving force to this trend. However we can find out the role of obligation to negotiate at the same time. Indeed the 1993 Chemical Weapons Convention was concluded on the base of Article 9 in the 1972 Biological Weapons Convention, which provides with undertaking to continue negotiation in good faith for “effective prohibition of chemical weapons.”

Second, we can expect that this judicial clarification of the obligation for nuclear disarmament would have the effect of encouraging compromise among the various conflicting approaches to nuclear disarmament. The nuclear disarmament obligation is imposed equally on nuclear weapons states and non-nuclear weapons states. Both groups are subject to Article VI. The “effective measures relating to... nuclear disarmament” in the article are to be taken by all state parties, whether or not they have nuclear weapons. If the cases offer guidelines on effective measures, they would create momentum for joint initiatives on nuclear disarmament.

31 Synthesis paper prepared by the chair of the OEWG contains recommendations proposed by various delegations including an idea of BAN treaty (A/AC.286/2, p. 7, para. 46).

32 *ICJ Reports 1996*, p. 267, para. 105 (2) F.

33 *Ibid.*, p. 264, para. 99.

One issue of the interpretation of Article VI of the NPT is the meaning of “effective measures” relating to nuclear disarmaments.³⁴ One might say this is a political matter. But in the light of a recent decision of the ICJ, we can find another perspective of this problem. It is the Whale Case in 2014, delivered just before the RMI lawsuits started.³⁵

In that Judgement, the ICJ observed “that the States parties to the ICRW [International Convention for the Regulation of Whaling] have a duty to co-operate with the IWC [International Whaling Commission] and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives”.³⁶ This is one of the reasons that Japan’s Whaling activities in Antarctic “do not fall within the provisions of (Article VIII, paragraph 1, of) [ICRW]”.³⁷ The IWC’s resolutions and the Scientific Committee’s views are not legally binding. But the ICJ recognizes on the Member States side the existence of a duty to co-operate with the treaty bodies. In the same way as the Whaling Convention, the NPT Review Conference and its Preparatory Committees do not adapt legally binding instruments. I wonder we can find out on the States Parties side a duty to co-operate with the treaty mechanism.³⁸ It is possible to deduce from the ICJ jurisprudence that States parties should give due regard to recommendations calling for nuclear disarmament of the NPT Review Conferences. And those recommendations identify the effective measures relating to nuclear disarmament like 2010 Action Plans.

Apart from Article VI, since the late 1950s nuclear disarmament has been required from the viewpoint of general and complete disarmament (GCD), to which many international instruments on nuclear disarmament refer. For instance, Article VI of the NPT also obliges the parties to negotiate on “a treaty on general and complete disarmament.” But in the 1996 Advisory Opinion the ICJ held that “there exists an obligation to pursue negotiations in good faith and bring to a conclusions leading to nuclear disarmament in all its aspect, under strict and effective international control.” It seems that the ICJ separated the obligation for nuclear disarmament from GCD in this opinion. In pursuing nuclear disarmament, the extent to which we consider the

34 Recently in May session of the 2016 OEWG, at least 126 states are of the opinion that “[article VI of the NPT] does not provide specific guidance as to what kind of negotiations should be pursued in good faith nor what the effective measures relating to the cessation of the nuclear arms race should be”, A/AC.286/WP.36, para. 2.

For interpretation of Article VI to the NPT generally, see Marco Roscini, “The Cases against the Nuclear Weapons States”, *ASIL Insights*, vol. 19, no. 10, 2015; Daniel Rietiker, “The Meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Analysis Under the Rules of Treaty Interpretation” in *Nuclear Non-Proliferation in International Law vol. 1*, Jonathan L. Black-Branch and Dieter Fleck eds., T.M.C. Asser Press, 2014; Daniel H. Joyner, “The legal meaning and implication of Article IV of the Non-Proliferation Treaty”, in *Nuclear Weapons under International Law*, Gro Nystuen et als. eds., Cambridge University Press, 2014; Nigel White, “Interpretation of Non-Proliferation Treaties”, in *Non-Proliferation Law as a Special Regime*, Daniel H. Joyner and Marco Roscini eds., Cambridge University Press, 2012.

35 See Whaling in The Antarctic (Australia v. Japan: New Zealand intervening) Judgment of 31 March 2014, *ICJ Reports 2014*, p. 226.

36 *Ibid.*, p. 257, para. 83.

37 *Ibid.*, p. 299, para. 247(2).

38 In the context of the protection of the atmosphere, the Special Rapporteur on this theme of ILC, Shinya Murase refers to the role of the principle of cooperation in international law, in *Second report on the protection of the atmosphere*, A/CN.4/681, 2 March 2015, paras. 60-76.

element of GCD to be a legal or political problem is one of the factors which have generated clashes among the approaches to nuclear disarmament. Some states invoke the GCD to argue for the validity of the step-by-step approach.³⁹ On the other hand, as above mentioned the humanitarian approach tries to redirect the discourse from conventional security and does not concern itself with the GCD concept. The ICJ might provide some helpful hints in this regard.

Lastly, I would like to note that the question on the status of nuclear weapons under the NPT underlies this lawsuit. In the 1996 Advisory Opinion addressing the legality of the threat or use of nuclear weapons, the ICJ concluded that “the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use,” such as the NPT, “could... be seen as foreshadowing a future general prohibition of the use of such weapons.” But after mentioning other similar instruments such as the Tlatelolco or Rarotonga treaties, it did not view these treaties themselves as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.⁴⁰ On the other hand, the ICJ suggests that there exists an obligation to achieve “a precise result” of nuclear disarmament, as mentioned above. In this light, a possible understanding of this is that the ICJ saw nuclear weapons as “transitional” or “temporary” instruments for security that are to be abolished at a certain time in the future, and also saw the privileged status of nuclear weapons states as “transitional” or “temporal” as well.⁴¹ I think this perception change of the status of nuclear weapons will promote delegitimization of the weapons.

The Applications by the MRI are mainly based on the understanding of the obligation for nuclear disarmament set forth in the 1996 ICJ Advisory Opinion. The main issue is compliance with that obligation, not the legality of the threat or use of nuclear weapons. Therefore one might say that there is no need to consider the status of nuclear weapons in the international community. But the RMI lawsuits mention “unacceptable harm to humanity” and invoke “the principles of humanity,” “elementary consideration of humanity,” and “law of humanity” in its Applications.⁴² It seems that the plaintiff envisions the development of international law aimed at “international law for humankind,”⁴³ but its implications are not clear.

In reality, however, the role of nuclear weapons in real-world security is very great, and their possession is widely perceived to be enormously effective in international politics.⁴⁴ The fundamental problem of how to

39 For example, Russian Federation said in the 2015 Review Conference of the NPT that “the total elimination of nuclear arsenals should take place in compliance with the Treaty on General and Complete”, NPT/CONF.2015/MC.I/SR.1, p. 9, para. 54.

40 See *supra* note 32, p. 253, paras. 62-63.

41 As for this temporary nature of holding nuclear weapons, see for example the statement of Brazil at the 2016 OEWG on 23 February 2016. In the public sitting of the Marshall Islands Case (RMI vs India), a Co-Agent of the RMI also insisted that “[t]he NPT merely acknowledges the temporary possession of nuclear weapons by five States pending disarmament”, CR 2016/6, 14 March 2016, pp. 10-11.

42 For example see *the Application against the UK*, p. 4, para. 6.

43 See A. A. C. Trindade, *International Law for Humankind: Towards a New Jus Centium*, 2nd rev. ed. -- M. Nijhoff, 2013. (Hague Academy of International Law monographs ; v. 8).

44 For example the government of Japan suggests the great role of nuclear weapons in national security comparing to “a clear understanding of the humanitarian consequences of the use of nuclear weapons”. See A/AC.286/WP.23 submitted by Japan to the 2016 OEWG, paras. 13-14.

view the status of nuclear weapons and nuclear weapons states arises in the Marshall Islands cases. Some new developments with regard to nuclear disarmament might appear during the proceedings of the Marshall Islands cases in coming years. These lawsuits offer an occasion to reconsider the desirable state of the international community.

Conclusion

As for the humanitarian approach, we should remind ourselves that there exists legal norms for banning nuclear weapons. Fully applying them would enable us to argue that all use of nuclear weapons is illegal. However, people who depend on nuclear weapons for their security do not agree with this interpretation and application of the law. We must therefore elicit change in their position on interpretation and application of the law. And that will require further elaboration, evolution, and innovation of the humanitarian approach.

When it comes to the Marshall Islands cases, for the time being, it is not clear whether the ICJ will address the above mentioned questions head-on. It is quite possible that the court will hand down a negative judgement with regard to jurisdiction at the procedural stage. Concerned parties need to watch the proceedings closely.

【付記】本稿は公益財団法人政治経済研究所の2015年度個人研究費による研究成果の一部である。