



Negotiation for a Nuclear Weapons Convention/ a Ban Treaty and Japan

Toshinori Yamada¹

Abstract

In 2016, the United Nations General Assembly decided to convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. This result was brought by the Humanitarian Approach to nuclear disarmament which has been advocated since 2010. The government of Japan does not squarely support it in spite of being “the only country to have experienced nuclear devastation in war.” This article sheds light on the legal background of Japan’s attitude by looking back to the debate on a nuclear weapons convention or a ban treaty mainly in National Diet of Japan and exploring the view of the Government of Japan on legality of the use of nuclear weapons, as well as conclusively considers some point for engaging Japan to the upcoming negotiation on nuclear disarmament under the UNGA.

Both humanitarian requirements against nuclear weapons and security concerns for nuclear deterrence have woven Japan’s complicated behavior on nuclear

disarmament. Given that negotiation on a legally binding instrument on nuclear disarmament is supposed to begin in 2017 under the UNGA, it is time to consider an appropriate form and contents of the instrument to prohibit nuclear weapons in order to engage Japan to this negotiation.

Introduction

On 27 October 2016, the United Nations General Assembly First Committee approved a draft resolution “Taking forward multilateral nuclear disarmament negotiations” (hereinafter as L.41), which includes a paragraph that says “[the General Assembly] decides to convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”² 123 states voted in favor, 38 voted against and 16 abstained.³

In the first place, it is an obligation of all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to negotiate in good faith effective measures on nuclear disarmament under Article VI of the

¹ Bunkyo University Chigasaki, Japan

² See United Nations document A/C.1/71/L.41.

³ See United Nations Press Release GA/DIS/3563. On 23 December 2016, the UNGA adapted L.41 as resolution 71/258.

NPT. According to the 1996 Advisory Opinion of the International Court of Justice (ICJ) regarding nuclear weapons, the obligation means to reach a goal of nuclear weapons abolition, mentioning an obligation to “bring negotiations to conclusion.”⁴ Given the current situation, in which nuclear weapons states have neglected their obligations to complete nuclear disarmament under Article VI of the NPT for many years, realization of “a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination” that L.41 envisages would play a role of complementing the NPT regime.

In 2015, the UNGA adopted a resolution entitled “Humanitarian consequences of nuclear weapons,” which stressed that “it is in the interest of the very survival of humanity that nuclear weapons are never used again, under any circumstances.”⁵ Furthermore, an Open-Ended Working Group (OEWG) taking forward multilateral nuclear disarmament negotiations has been convened in Geneva during 2016.⁶

In such a situation, L.41 recommended efforts to elaborate concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons and implementation of measures that could contribute to taking forward multilateral nuclear disarmament negotiations, and decided to convene a UN conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards

their total elimination. It also calls upon States participating in the conference to conclude as soon as possible a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, and encourages participation and contribution of civil society representatives as well as international organizations.⁷

While those UNGA resolutions have appeared on the background of Humanitarian Approach to Nuclear Disarmament⁸ which has been advocated for some years, the government of Japan does not squarely support it in spite of being “the only country to have experienced nuclear devastation in war.” Indeed Japan voted against L.41 in 2016 and abstained on the OEWG resolution in 2015, while it voted for the “Humanitarian consequences” resolution in 2015.

What makes Japan take such complicated attitude to nuclear disarmament? This article sheds light on the legal background of Japan’s attitude by looking back to the debate on a nuclear weapons convention or a ban treaty mainly in National Diet of Japan and exploring the view of the Government of Japan on legality of the use of nuclear weapons, as well as conclusively considers some point for engaging Japan to upcoming negotiation on nuclear disarmament under the UNGA.⁹

I. Initiatives in Japan Aimed at Making a Nuclear Weapons Convention (NWC) a Reality

⁴ See Legality of the threat or use of nuclear weapons, Advisory Opinion, *ICJ Reports 1996*, p. 267, para. 105(2)F.

⁵ See United Nations General Assembly Resolution 70/47 of 7 December 2015.

⁶ See Report of the Open-ended Working Group taking forward multilateral nuclear disarmament negotiations, *A/71/371*.

⁷ See *supra* note 2, paras. 6-8, and 12.

⁸ See Toshinori Yamada, “Humanitarian Approach to Nuclear Disarmament and the Marshall Islands Cases”, *Journal of the Faculty of International Studies*, Bunkyo University, Vol. 27, No. 1 (2016. 7).

Purpose in this part is to sum up the course of events in Japanese initiatives aimed at making a Nuclear Weapons Convention (NWC) a reality, review the current situation, and observe what needs to be done henceforth.

I will chronicle the initiatives, and then describe the NWC debate by examining mainly the arguments put forth in Diet hearings and in the Hiroshima and Nagasaki peace declarations.

“Nuclear Weapons Convention” here primarily means conventions that totally abolish nuclear weapons, and which are referred to in the Malaysian resolution discussed below, but I also use it in a broad sense including conventions or treaties that prescribe partial bans, such as a treaty that ban use, development, possession and so on.¹⁰

A. History of Drafting NWCs in Civil Society

Japan has a history of NWC proposals, mainly by academics and lawyers. The 22nd World Conference against A & H Bombs, held in 1976, released the “Convention on the Prohibition of the Use of Nuclear Weapons (Draft),” which was drafted by seven Japanese having professions such as international legal scholar, including Shigejiro Tabata and Shigeki Miyazaki. In 1978 the Japan Federation of Bar Associations released a “Draft Treaty on the Prohibition of the Use of Nuclear Weapons”. In 1993 a lawyer, Yasuhiro

Matsui, released an “Outline of a Convention to Abolish Nuclear Weapons” at the World Conference against A & H Bombs. Unfortunately, these proposals had no effect on Japan’s nuclear policy.

B. The Abolition 2000 Campaign and Introduction of the Model Nuclear Weapons Convention

On April 25, 1995 Abolition 2000 was launched as a worldwide network seeking to abolish nuclear weapons. According to its Founding Statement, Abolition 2000 demands that NPT parties “[i]nitiate immediately and conclude negotiations on a nuclear weapons abolition convention that requires the phased elimination of all nuclear weapons within a time-limited framework, with provisions for effective verification and enforcement.”

In response, the Model Nuclear Weapons Convention (MNWC) was released on April 7, 1997. In Japan the text was translated into Japanese primarily by Waseda University Professor Kenji Urata, and included in a pamphlet published by the Japan Association of Lawyers Against Nuclear Arms (JALANA).

In 2007 a revised version of the MNWC was released, and in conjunction with this *Securing Our Survival* was published. A translation of this book was published in Japan in 2008.¹¹ Additionally, in 2009 excerpts of the MNWC translation had been included

⁹ This article is based on the following my papers: “Initiatives in Japan Aimed at Making a Nuclear Weapons Convention a Reality”, in *Japan Association of Lawyers against Nuclear Arms, Recommendations to the NPT Review Conference 2010*, distributed at Side Events of the 2010 NPT Review Conference in New York; “Examination of the view of the Government of Japan on the use of nuclear weapons from the viewpoint of the IHL commitment”, Conference Paper, presented at a conference convened February 10-11, 2011, in Vancouver, Canada, by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms, entitled “Humanitarian Law, Human Security: The Emerging Framework for the Non-Use and Elimination of Nuclear Weapons,” in acknowledgement of the Simons Chairs in International Law and Human Security at Simon Fraser University.

¹⁰ For so-called a BAN treaty, see ICAN’s website (<http://www.icanw.org/>).

¹¹ Kenji Urata ed., *Chikyu no Ikinokori* (in Japanese), Nippon Hyoron sha, 2008.

in Japan's only collection of documents on disarmament.¹²

C. Reactions to the Nuclear Weapons Conventions: Hiroshima and Nagasaki Peace Declarations, and Diet Deliberations

1. Pre-1995

Since before the 1995 decision to indefinitely extend the NPT, there had been expressions of concern and opposition about the treaty's indefinite extension from Japan's civil society. At the same time, some people had tried to bring about a convention to abolish nuclear weapons. For example, the 1993 Hiroshima peace declaration stated, "The nuclear powers... should set the goal of total abolition of all nuclear weapons and announce to the world a target date of no later than the year 2000" while the Nagasaki peace declaration of that same year stated, "An international agreement totally banning nuclear weapons should be concluded through multilateral negotiations." Additionally, the 1994 Nagasaki peace declaration stated, "Nuclear powers should abandon the idea of nuclear deterrence... and take action as soon as possible for the conclusion of a 'Convention for the Total Banning of Nuclear Weapons,' which would bring about the abolition of nuclear weapons." In response, proposals have been made in Diet deliberations for a convention to totally ban nuclear weapons and a convention to ban the use of nuclear weapons, but there has never been a definite reply from the government.

2. 1996 to 2000

In July 1996 the International Court of Justice (ICJ) issued an advisory opinion on nuclear weapons,¹³ and since then, as a follow-up to that opinion, the UN General Assembly has adopted resolutions (the so-called Malaysia Resolutions). Until the 2000 NPT RevCon, the Hiroshima peace declarations advocated a treaty for nonuse of nuclear weapons (1996–1998). Nagasaki peace declarations, on the other hand, advocated a convention to abolish nuclear weapons (1996, 1997) and a convention to totally ban nuclear weapons (1998–2000).

Diet deliberations from 1995 to 2000 examined the Japanese government's attitude toward the Malaysia resolutions (abstention), and the Japanese government's thinking on conventions to abolish nuclear weapons (conventions to totally ban nuclear weapons). These waves of questions almost completely died out in 2000, and until the end of the 2005 NPT RevCon, there were hardly any questions relating to nuclear weapons conventions. Replies to these questions from the government are summed up by its written answer to a written question in 2002.

Concerning the creation at the present time of an international agreement for abolishing nuclear weapons, many countries including Nuclear Weapon States do not concur, and the government's view is that seeking the preparation of such an international agreement right now would aggravate the confrontation between nuclear and

¹² Hisakazu Fujita and Masahiko Asada, eds., *Basic Documents of Disarmament* (in Japanese), 3rd. ed., 2009, Yushindo

¹³ See Legality of the threat or use of nuclear weapons, Advisory Opinion, *ICJ Reports 1996*, p. 226.

non-nuclear weapon states, with the possible consequence being instead a delay in nuclear disarmament. In the government's view, it is important to make steady step-by-step progress toward realistic and concrete measures for nuclear disarmament to quickly bring about a world without nuclear weapons, such as quickly bringing the CTBT into force, and quickly starting negotiations on the Fissile Material Cut-off Treaty. The government intends to further enhance its diplomatic efforts for these purposes.¹⁴

There were some noteworthy items in Diet discussions of this time period.

First, many of the questioners understood the Malaysia resolutions and the NWC as proposals for abolishing nuclear weapons with time limits. The government also understood the Malaysia resolutions as advocating a so-called comprehensive approach. The government holds fast to a step-by-step approach, and is therefore dismissive of the proposals for the Malaysia resolution and NWCs.

Second, experts summoned by the Diet as unsworn witnesses stated their opinions on the MNWC in Committee on Foreign Affairs and Defense, House of Councilors, June 11, 1988. They were former diplomatic official Mitsuro Donowaki (then counselor at the Ministry of Foreign Affairs and chair of the UN Group of Governmental Experts on Small Arms) and former UN Assistant Secretary-General Yasushi Akashi (then director of the

Hiroshima Peace Institute at Hiroshima City University). Mr. Dnowaki pointed out the small possibility of meeting the 15-year time limit for abolishing nuclear weapons as provided by the MNWC. Mr. Akashi asserted that putting a time limit on nuclear weapons abolition is unrealistic, and then went on to argue that the abolition plan advanced by the Henry L. Stimson Center is more detailed and more firmly grounded in reality. He has especially taken note of its flexibility. Both experts regard the MNWC as a proposal for a comprehensive approach.

Third, the government nevertheless has responded that "if we reach the stage at which nuclear weapons are abolished, we will naturally have also reached the stage at which we will create a convention that bans nuclear weapons."¹⁵

As this shows, discussions in the Diet over this time period have been consistently concerned with which approach is appropriate — the comprehensive approach or the step-by-step approach, and discussion has not yet arrived at the stage where there is debate on the conditions for realizing a nuclear weapons-free world, which is what the MNWC advocates.

It is worth noting that during this period Yukio Hatoyama, who was previously the president of Democratic Party of Japan and became a prime minister later, took the position that the government should call for conclusion of a convention banning nuclear weapons in plenary sitting of the House of Representatives, December 12, 1996.

¹⁴ See Witten Answer No. 45 to Toshimasa Yamada, member of the House of Representatives, dated on 23 April 2002.

¹⁵ See explanation by Nobuyasu Abe, Deputy Director-General, Ministry of Foreign Affairs at Committee on Foreign Affairs of the House of Representatives, dated on 2 June 1999.

3. 2001 and Beyond

After 9/11, NWC advocacy was for a time subdued. The 2002 peace declarations by Hiroshima and Nagasaki make no mention of NWCs. Nagasaki's peace declarations in particular say nothing at all about NWCs from 2002 to 2008. By contrast, in Hiroshima's peace declarations from 2003 to the present we see mentions of conventions to ban nuclear weapons and a position that reflects the 2020 Vision of Mayors for Peace (such as the Hiroshima-Nagasaki Protocol).

As stated above, during the years from 2001 to 2005 there were hardly any NWC-related questions in Diet proceedings. Since 2006 there have again been questions on conventions to totally ban nuclear weapons and conventions to ban the use of nuclear weapons. Basically the government's response has again been to advocate the step-by-step approach.

There are two things to note carefully in these Diet deliberations. First, questioners do not necessarily present arguments based on the comprehensive approach, and second, the government's response has, while basically calling for a gradual approach, left some room in its stance for more consideration.

D. The Present Situations

As stated above, the Japanese translation of *Securing Our Survival* was published in July 2008. And attention was again focused on NWCs thanks to the five-point proposal for nuclear disarmament by UN Secretary-General Ban Ki-moon October 2008.¹⁶

To start with, the Hiroshima and

Nagasaki peace declarations of 2009 both referred to a "nuclear weapons convention." In particular, the "4th Nagasaki Global Citizens Assembly for the Elimination of Nuclear Weapons" was held in February 2010 in Nagasaki. Its Workshop II was on the theme "Towards a Nuclear Weapons Convention," making it 10 years since the first assembly in 2000 when it had taken up the subject of a nuclear weapons convention. The Nagasaki Appeal called for establishing a process for a nuclear weapons convention.

Papers written in Japanese by experts have also been presenting the MNWC.

Further, in September 2008 Japan and Australia launched an initiative called the International Commission on Nuclear Non-proliferation and Disarmament (ICNND). Founded in response to this was the ICNND Japan NGO Network, which carried on energetic dialog with the ICNND. As a result, the ICNND report released in December 2009 asked that consideration of the MNWC be started quickly.¹⁷ The report also presented a road map for eliminating nuclear weapons. The very fact that this road map was presented could be seen as one response to the problem posed by the MNWC.

The ICNND report imposed no time limit on the second of the two stages in achieving nuclear weapons abolition, and in this respect opinions are divided on the estimation of the report. But at the same time, the report also said that discussion was needed on how to refine the MNWC. The government of Japan praised the report. It was still unclear whether it would adopt this ICNND road map and

¹⁶ See United Nations Press Release SG/SM/11881-DC/3135, 24 October 2008.

¹⁷ It said "Work should commence now on further refining and developing the concepts in the model Nuclear Weapons Convention now in circulation...", ICNND Report, recommendation 73, available at <http://icnnd.org/>.

move forward with the job of refining the MNWC. If it had done, it would have been possible to have a more in-depth discussion on the road map to nuclear weapons abolition in Japan because civil society could ask new questions from the MNWC's stance about the ICNND's approach. And if this discussion had come to be carried on among governments and at a higher level, it would have moved closer to signifying preparatory work for achieving a nuclear weapons convention.

In 2014, Japan submitted with other countries a working paper entitled "Building blocks for a world without nuclear weapons" to the 2014 NPT Preparatory Committee and insisted that the international community should focus not on differences but on common ground by identifying concrete and practical "building blocks" for the shared goal of a peaceful and secure world free of nuclear weapons. Among blocks, "a multilateral nuclear disarmament framework or a nuclear weapons convention" was referred, but only as final building block with a longer perspective.¹⁸ In the 2016 OEWG, Japan insisted on the similar position in a working paper entitled "A progressive approach to a world free of nuclear weapons: revisiting the building blocks paradigm."¹⁹

E. Future Challenges

First, it is necessary to confirm the basic principles embodied in NWCs. Generally the making of a multilateral convention is preceded by confirmation of its general principles in the United Nations. For example,

for the International Covenants on Human Rights, there was a resolution on the Universal Declaration of Human Rights in the UN General Assembly, while for the Space Treaty it was the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. The principles of the NPT were confirmed by UN General Assembly Resolution 2288. For an NWC as well, the basic principles must be debated, and guidelines set forth for future negotiations.

Secondly, one of those basic principles must be the illegality of the use or threat of nuclear weapons. Reducing nuclear weapons without negating the doctrine of nuclear deterrence, which forms an integral duality with the legality of the use of nuclear weapons, could delay the abolition of nuclear weapons because nuclear deterrence necessitates maintaining a credible nuclear capability.

Lastly but not leastly, there must be discussion on ways of reaffirming the illegality of the use or threat of nuclear weapons. The illegality of the use or threat of nuclear weapons should not be established for the first time when an NWC is enacted in the future; there must be a reaffirmation that they are already illegal now. Unfortunately, the 1996 ICJ advisory opinion did not conclude that they are illegal in any circumstances. The aim in requiring reaffirmation of the illegality of the use or threat of nuclear weapons in the process of making the NWC happen is to establish, through seeking the illegality of nuclear weapons, a social norm that denies

¹⁸ See Working Paper submitted by Australia, Belgium, Canada, Colombia, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Japan, Lithuania, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and Ukraine, NPT/CONF.2015/PC.III/WP.23, paras. 1 and 7.

¹⁹ See A/AC.286/WP.9/Rev.2.

their legitimacy. All means should be considered from this perspective. There are many conceivable forms, such as a treaty banning the use of nuclear weapons, UN General Assembly resolutions, Security Council resolutions, another ICJ advisory opinion, revision of the Rome Statute of the International Criminal Court, a document by the NPT Review Conference, or a declaration of “public conscience.” We need debate that discerns the strong and weak points of each.

II. Examination of the view of the Government of Japan on the use of nuclear weapons from the viewpoint of the International Humanitarian Law (IHL) commitment

The purpose in the part II 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.”²⁰

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.”²¹

This consistency suggests that the position of Japan is unchanged.²² But those 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

²⁰ 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>.

²¹ See UN Document A/C.1/64/PV.22, p. 11.

²² 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.

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.”²³ Due to strong criticism in and out of the Diet, the Government decided to delete these phrases.²⁴ But it is clear from the debates after the decision that they did not change their fundamental legal view, but just its expression.²⁵

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.

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.²⁶ 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.²⁷ 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.²⁸ They insisted that analogy to the existing other prohibited inhumane weapons is inappropriate.²⁹

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

²³ 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.

²⁴ Statement of Foreign Minister Kakizawa, at Budget Committee of the House of Representatives on June 8, 1994.

²⁵ 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.

²⁶ 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 25.

²⁷ *Ibid.*

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.³⁰ The government officials refer to “immense power to cause destruction”, but do not touch on its uncontrollability.³¹ They might not have considered thoroughly the questions put to ICJ by WHO and UNGA.³²

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.³³ 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.³⁴ We find it here, too.

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 concepts³⁵. Indeed the concept of *Kriegsrason* is unacceptable. But if the meaning of military necessity which

²⁸ 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 25. 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.

²⁹ Statement of Tanba, Foreign Affairs Committee, the House of Councilors, June 20, 1994.

³⁰ 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.

³¹ In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Mayor 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.

³² 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.

³³ For example see Article 51(5)(b) of 1977 Additional Protocol I.

³⁴ 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.

³⁵ 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” and “military advantage” in the context of “unnecessary suffering”, see *ibid.*, pp.240-241, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70.

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.³⁶ 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.³⁷ 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, lawsuits for certification of atomic bomb sickness in Japanese Courts have clarified that radiation effects of atomic 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.³⁸ In January 2011, Japan announced its willingness to participate in the discussion on a nuclear weapons convention in the CD.³⁹ 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.”⁴⁰ We need a concrete and robust strategy to overcome the political ambiguity in order to ensure to apply

³⁶ 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.

³⁷ For example, statement of Director General Tanba, at Budget Committee, the House of Councilors, on June 23, 1994.

³⁸ 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.

³⁹ “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).

⁴⁰ 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. Cf. National Security Strategy December 17, 2013, compiled by the Government of Japan, available at <http://www.cas.go.jp/jp/siryou/131217anzenhoshou.html>.

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.

Concluding observations

A representative of Japan in UNGA First committee explained his voting against L.41: “In order to advance our common goal effectively, it is essential that Nuclear Weapon States and Non Nuclear Weapon States work together and take united action based on a clear understanding of the inhumanity of nuclear weapons and also with an objective assessment of the reality of the severe security environment.... Japan does not deny various efforts, including pursuit of a legal framework, in order to achieve a world without nuclear weapons. However we decided our voting behaviour based on the consistency with our basic national position just mentioned before.”⁴¹ Both humanitarian requirements against nuclear weapons and security concerns for nuclear deterrence have woven Japan’s complicated behavior on nuclear disarmament.

Given that negotiation on a legally binding instrument on nuclear disarmament is going on in 2017 under the UNGA, the

following points should be considered for engaging Japan to this negotiation.

First, Article 6 of the NPT is a firm legal foundation for nuclear disarmament, which is legally binding on NWSs and their allies, including Japan. It is necessary to clarify that the disarmament instrument is a mainstream effective measure relating to nuclear disarmament under the meaning of Article 6. In order that, reference to Art. 6 is needed in the instrument on the one hand, and approval of the instrument by some NPT documents, like 2020 final document, is essential on the other hand. Current polarizing debates on a ban treaty between NWSs and NNWSs, if it continues, will make it difficult to get to a consensus on the 2020 NPT final document. NWSs and their allies will not be able to ignore relationship between NPT and the disarmament instrument. In this point there is room for bargaining between disarmament and non-proliferation. If the disarmament instrument includes prohibitions on development and possession of nuclear weapons, those provisions means non-proliferation obligations for NNWS. Stronger provisions with confirmed verification system on the disarmament instrument, which seem acceptable to NWSs, are good bargaining chips for deeper disarmament measure by NWSs.

Secondly, as for the use, there is no legal gap. If IHL applies completely, all use of nuclear weapons, including in the extreme circumstance, are illegal. As for the threat, illegality of a threat of nuclear weapons is depend on illegality of use that is envisaged under that threat according to the 1996 ICJ

⁴¹ Statement by the representative of Japan of 27 October 2016. The Government of Japan explained the same thing to some Diet members. For example see Written Answer No. 34 at the House of Councillors of the 192th session of the Diet to a councillor Mizuho Fukushima.

advisory opinion. In this meaning threat and use are inseparable (although it is arguable from NWSs that deterrence does not constitute threat itself). If so, it is enough only to reaffirm that complete application of IHL under any circumstances in a disarmament instrument or a ban treaty, for instance in its preamble, in order to prohibit/re-prohibit threat or use of nuclear weapons.

Finally, explicit prohibition in operational clause will represent decisive intent of treaty founders for nuclear abolition, have strong social impact, and create social and legal norm for prohibition of nuclear weapons per se. On the other hand, some nuclear umbrella states, like Japan, will hesitate to join such an instrument. If a new disarmament instrument with prohibition of cooperation to illegal threat or use of nuclear weapons by other states, but for explicit prohibition of threat or use itself, such treaty draft seems to provide room for negotiation to Japan. Because Japan is of opinion that IHL apply to nuclear weapons and it is possible to use them legally under some circumstances. But the government of Japan has not explained such circumstance in detail so far. The above mentioned draft would provide an opportunity to seek the government of Japan to clarify its position, get the answers, and re-open nationwide debate on nuclear disarmament in Japan.

About the time this article is issued off, a new negotiation for nuclear disarmament under the UNGA would be kicked off. Careful observation and severe evaluation on this process are needed from the viewpoint of its positive implication to Japan.

