

# The Illegality of the Atomic Bombings of Hiroshima and Nagasaki from the Perspective of Customary International Law at the Time of 1945<sup>1</sup>

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## I. Introduction

This paper aims to answer the question, "Was the atomic bombing of Hiroshima and Nagasaki illegal under customary international law in 1945?"

In doing so, it takes as its starting point the so-called Shimoda Judgment issued by the Tokyo District Court in 1968. The Shimoda decision is only a Japanese domestic judgment. However, even domestic judgments are positioned as "subsidiary means for the determination of rules of law" under international law. The Shimoda decision is also described as having a "positive place" in the subsequent development of international law, including the 1996 advisory opinion on nuclear weapons by International Court of Justice (ICJ), and as having played a "facilitating role" in that development.

In particular, the principles of distinction with respect to military objectives and the prohibition of unnecessary suffering, which were set forth in the Shimoda decision and which led to the illegality of the atomic bombings of Hiroshima and Nagasaki, are also recognized by the ICJ as applicable in determining the legality of the threat or the use of nuclear weapons.

This paper first examines some of the premises of the case, then examines the legality of the U.S. atomic bombings of Hiroshima and Nagasaki (hereinafter referred to as the "bombings") in light of the aforementioned two principles, and finally concludes with a discussion of the circumstances precluding wrongfulness.

## I. Prerequisite Considerations

The first is the issue of Intertemporal law. As in law in general, the principle of non-retroactivity exists in international law.

Therefore, the legality of the events of 1945 must be judged in light of the positive law of the time, and in accordance with the theme of this paper, the customary international law that should be clarified is the customary international law at the time of the atomic

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<sup>1</sup> This paper is a provisional translation from the Japanese manuscript, and the original notes have not been translated.

bombings of Hiroshima and Nagasaki.

Second, customary international law is defined as "international custom, as evidence of a general practice accepted as law" according to the Statute of the Permanent Court of International Justice of 1920, which was succeeded by the ICJ Statute enacted in 1945, and this article is still applied today without amendment. Therefore, it can be said that the definition of customary international law in 1945 is the same as today. According to the prevailing academic theory, the requirements for the establishment of customary international law are general practice and *Opinio Juris*.

Since this paper examines customary international law as the law applicable to this case, the so-called "general participation clause or *clausula si omnes*," which is a treaty provision, is omitted from this paper.

Third, there is the question of whether the laws of war apply equally between Japan and the U.S. with regard to "wars of aggression" by Japan.

This is particularly problematic at a time when war was being outlawed through the Covenant of the League of Nations and the Treaty for Renunciation of War, and the prohibition of the use of force was being established. Under a legal system in which the prohibition of war and the use of force had been established, hostilities theoretically existed in the relationship between the aggressor and its victim, and if one takes the position that "law (or right) does not arise from injustice" (*ex injuria jus non oritur*), the traditional laws of war that recognize the rights and obligations of the aggressor nation as those of its victim would lose their validity.

Such a theory of discriminatory application of the laws of war was argued in academic circles. However, it was not seen in the state practice of the time, and the dominant theory of the time supported the equal application of the laws of war. In the Pacific War, both the U.S. and Japan recognized the equal application of the laws of war. For example, at the beginning of the war, the U.S. requested Japan (through the International Law Commission of the Red Cross) to apply reciprocally the Geneva Convention of Prisoners of War of 1929, which Japan had not ratified, and Japan responded that it would apply the Convention with necessary changes (*mutatis mutandis*). The postwar Geneva Conventions of 1949 and the two Additional Protocols of 1977 also maintain equal application in armed conflicts.

Fourth, there exists an argument that there are no laws and regulations applicable to nuclear weapons (atomic bombs), which were "new weapons" at the time, and that they are legal. In fact, this was an issue in the Shimoda Case.

At the time, nuclear weapons were a newly invented weapon, so it was natural that there were no specific prohibition rules for nuclear weapons at that time. However, laws, in the first place, regulate various acts and events in general that belong to specific categories that occur after their enactment. The laws of war also regulate the methods of warfare in general, which belong to the category of wartime hostilities. As will be discussed below, the act of dropping bombs from aircraft as a "method of warfare" has existed as a state practice

before the invention of nuclear weapons, and there are principles and rules governing this practice. In light of these principles and rules, it is quite possible to examine the legality of the act of dropping the atomic bombs.

In fact, in the Shimoda decision, the court held that "prohibition" includes "cases in which the use of a new weapon is considered to be naturally prohibited in view of the interpretation and analogous application of existing international law (customary international law and treaties)," and further held that the prohibition of a new weapon is evaluated in light of "various principles of international law. The subsequent ICJ Nuclear Weapons Advisory Opinion also recognized the application of the principles of international humanitarian law (IHL) to nuclear weapons.

On the other hand, individual rules specifically prohibiting nuclear weapons as a "means of warfare" did not exist at the time. However, as will be discussed below, the "prohibition of unnecessary suffering" that regulates means of warfare (weapons) is established as a principle. In light of this principle, it is possible to evaluate the atomic bombs dropped on Hiroshima and Nagasaki. In fact, based on the prohibition of unnecessary suffering, as discussed below, the Shimoda decision held that the atomic bombings caused unnecessary suffering by analogy with poison and poison gas weapons, which are already prohibited. This can be understood as referring to poison and poison gas as a merkmal regarding "necessary/unnecessary" suffering caused by weapons.

Against the view that permits the application of such principles to individual acts, there may be objections from the standpoint of distinguishing between principles and rules. That is, the position is that it is the rules that can regulate the concrete conduct of legal entities, while the principles are behind the rules and provide the basis for the existence of the rules, but do not regulate the concrete conduct of legal entities. From this standpoint, the principle does not directly regulate specific actions by the U.S. (i.e., the dropping of the atomic bombs), or at least it lacks specific requirements for its application, and thus cannot be properly applied. However, the PCJI and the ICJ have made judgments in individual cases in the absence of specific rules, drawing on the legal principles behind those rules. Moreover, the foregoing description of principles and rules is not applicable to all areas of international law. In particular, the so-called Martens Clause has long existed in the law of war and international humanitarian law. According to the Martens Clause, even in the absence of specific rules in the form of relevant treaties, parties to an armed conflict are "subject to protection under the principles of international law derived from established custom, humanitarian principles and public conscience, and to the control of such principles of international law. It should also be noted that in 1945, the 1907 Hague Land War Convention, including the Martens Clause, was considered customary international law. In its 1996 Nuclear Weapons Advisory Opinion, the ICJ described the Martens Clause as "an effective means of addressing the rapid evolution of military technology" and as "the pre-existing customary law". Thus, under the laws of war or

IHL, it is possible to determine the legality of individual hostilities in light of principles.

Thus, even in the absence of a specific rule expressly prohibiting a weapon, the Martens Clause functions to ensure that principles of the laws of war or international humanitarian law govern the weapon in question. In addition, the 2017 Treaty on the Prohibition of Nuclear Weapons, in light of the Marten Clause, "[r]eaffirm[s] that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience" (PP 11), and "[s]tress[es] the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons, and recogniz[es] the efforts to that end undertaken by the United Nations, the International Red Cross and Red Crescent Movement, other international and regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha" (PP 24). The role of public conscience stressed in PP 24, when read in conjunction with PP 11, may be said to serve the function of transforming the call for the total elimination of nuclear weapons into a norm against nuclear weapons.

Having completed the examination of the premises above, we will now examine the two aforementioned principles of customary international law as it existed in 1945.

## II. Consideration of Applicable Laws

### A. The Principle of Distinction

The question arises whether there were separate treaties or customary laws governing aerial bombardments at the time. Doubts are raised even today. Certainly, there have been no cases of prosecution or punishment based on indiscriminate bombing in the postwar Nuremberg Trials or Tokyo Trials, which, from the perspective of the principle of criminal jurisprudence, is only natural in a situation where clear-cut specific prohibited rules are vague. However, this does not mean that the principles and rules of the laws of war governing aerial bombardments do not exist. In fact, the Shimoda decision was rendered in light of the principles and rules that existed at the time. It was the military targeting principle regarding undefended cities and the prohibition of indiscriminate attack.

To begin with, the regulation of methods of warfare has been the subject of making treaties since the 19th century. Typical examples are the Hague Land Warfare Regulations annexed at the Hague Convention IV of 1907, the Naval Warfare Convention (the Hague Convention IX of 1907), and the Hague Rules of Aerial Warfare. In these regulations, indiscriminate attacks on defended cities are permitted, and attacks on military objects in undefended cities are allowed. It should be noted that some targets are still prohibited even in defended cities (Article 27 of Hague Regulations of the Hague Convention IV) . In other words, indiscriminate attacks without identifying the target of the attack were prohibited, whether in defended or unprotected cities. It should be noted that, although the Land Warfare Regulations apply to armed land forces (Article 1 of the Hague Convention IV), the 509th

Composite Group, which dropped the atomic bombs on Hiroshima and Nagasaki, belonged to the US Army.

The 1907 Hague Regulations on Land Warfare were considered customary law in 1945.

The question is, first, whether these rules apply to air warfare, and second, even if they do, have they changed through state practice at a time when aerial bombardments were commonplace?

The first is its application to air warfare. The Shimoda decision focused on the Hague Rules on Aerial Warfare, but even today there are doubts about whether the said Rules had become customary law at that time. However, in light of the fact that the Hague Land Warfare Regulations, as mentioned above, prohibit indiscriminate attacks, whether on defended or undefended cities, and do not limit the means of combat that are subject to their regulation in the first place (for example, Regulation 25 states 'by whatever means'), it can be affirmed that the regulations of the time covered air raids, even if not by the Hague Rules of Aerial Warfare. The U.S. and Japan also recognized the application of international law to air warfare.

Second is an assessment of the fact that target area bombardments or carpet bombings (strategic bombings) have become commonplace. The Shimoda decision suggests the legality of target area bombardments. However, the legality of these methods remains questionable when the circumstances of the time are examined. In any case, however, the distinction between military and civilian objectives was maintained in principle, and indiscriminate bombing itself was condemned and considered illegal.

In light of these principles and rules, the atomic bombings of Hiroshima and Nagasaki were in violation of the principle of distinction between military and civilian objects and the prohibition of indiscriminate attack, which were believed to have existed at the time.

Although military bases and munitions factories certainly existed in Hiroshima and Nagasaki at that time, they were only a small part of the city area. The damage caused by the atomic bombings was not limited to these facilities and their surrounding areas, but extended over the entire cities. The victims were not limited to combatants. Many of the dead and wounded were civilians.

In view of the results of such damage, it is clear that the atomic bombings constituted indiscriminate attack and violated the principle of distinction.

## B. The Prohibition of unnecessary suffering

The Shimoda case decision cited the prohibition of unnecessary suffering as a principle that prohibits "means of warfare". Today, "prohibition of unnecessary suffering" is understood as a principle or rule that prohibits not only means but also methods of warfare.

The principle of the prohibition of unnecessary suffering was well established in 1945, and the ICJ has referred to this prohibition as being "at a very early stage," and indeed there are long-standing treaties that prohibit the use of certain weapons on the basis of this

prohibition.

There are three interpretive issues in applying this principle of prohibition to this case. First, in the absence of a specific treaty prohibiting the use of such weapons, can this principle alone lead to the prohibition of such weapons (means of warfare)? Second, what are the criteria for distinguishing "necessary/unnecessary"? Third, does this principle protect not only combatants but also civilians?

Regarding the first, as noted above, there are arguments and state practice that specifically require a prohibition rule. The ICJ Advisory Opinion also mentions the history of the illegality of the use of weapons themselves, which has been shaped by individual bans. Furthermore, if weapons are banned without individual prohibition rules, individual prohibition treaties would lose their *raison d'être*.

In practice, however, there are also claims and state practice that derive prohibition from this general principle. For example, the Shimoda decision drew prohibition from analogy. The ICJ has also held that the general illegality of the use of nuclear weapons is derived from various principles, including this principle. In the first place, the purpose of individual prohibition treaties is to prohibit all weapons that fall under a certain category. In contrast, the subject of this case is not the categorical prohibition of nuclear weapons or the confirmation of their illegality, but the specific use of the atomic bombings of Hiroshima and Nagasaki. At least in IHL, as mentioned above, it has been possible to determine the legality of individual hostilities in light of general principles. The existence of the Martens Clause in IHL also supports the use of basic principles of humanitarian law, even in the absence of a clear prohibition rule. In addition, the existence of a strictly defined law and regulation is required to hold an individual criminally responsible for war crimes, and easy analogies are prohibited, but this is not such a case.

Second is the issue of assessing the criteria of necessity regarding the "prohibition of unnecessary suffering".

On this issue, the Shimoda decision drew an analogy from existing prohibition provisions (e.g., The Geneva Protocol of 1925). In other words, it examined whether the atomic bombings of Hiroshima and Nagasaki caused "unnecessary suffering" as compared to poison gas, and as a result, held that the atomic bombings of Hiroshima and Nagasaki violated the same principle. This judgment can be said to have used the effects and damage caused by poison, poison gas, and bacteria as the criteria for assessing "unnecessary suffering".

Although there are those who argue that atomic bombs should be included in the same category as poison gas, since immediately after World War II, nuclear weapons have been classified as weapons of mass destruction, like biological and chemical weapons, but they are recognized as different categories of weapons. Today, there are different treaties banning biological weapons, chemical weapons, and nuclear weapons. However, as noted above, this is an issue for the category of nuclear weapons, not for specific atomic bombs.

In this connection, there are those who, relying on the St. Petersburg Declaration of 1868, argue that unnecessary suffering means inflicting further suffering on combatants who are "hors de combat" (outside of combat). According to this interpretation, the atomic bombings of Hiroshima and Nagasaki, especially in light of their radiation effects (especially late effects such as cancer or leukemia), are claimed to have increased the suffering of combatants "outside of combat" (especially even after the war).

On the other hand, there are those who argue that the criteria are a balance between military necessity and anticipated suffering to the population, and this is currently the position of many countries. The ICJ Advisory Opinion also expresses this view. The Shimoda decision also refers to "military appropriate effects". According to this theory, the balance between the military objective to be achieved by the atomic bombings of Hiroshima and Nagasaki and the damage resulting from the bombings is to be considered, and if the former is greater than the latter, the latter is not unnecessary suffering.

The effects of the atomic bombings, especially the radiation effects that followed after the war, will be examined to see if they balance the military advantages achieved by the atomic bombings. As noted above, troops were stationed in Hiroshima and Nagasaki, and munitions factories existed there. While there was certainly military advantage to be gained from their destruction, the destruction of these facilities was an act that the U.S. military of the time could have carried out even without the atomic bombings (aerial bombardments in various locations of Japan). Compared to the military advantages gained from their destruction, the 140,000 dead in Hiroshima and 70,000 dead in Nagasaki must be considered a significantly large number. Moreover, the radiation damage that has continued to occur since the end of the war clearly exceeds the military advantages of the former.

However, there exists a discourse that the atomic bombings hastened the end of the war or saved lives that would have been lost had the war continued. As to whether this early ending of the war and saving of lives can be included as military advantages, this issue will be discussed in more detail in the section on the circumstances precluding wrongfulness.

Third, does this principle of prohibition of "unnecessary suffering" protect not only combatants but also civilians? The Shimoda case decision refers to "the lives of many civilians," etc., suggesting that this principle protects civilians as well. However, this principle is generally understood to protect combatants. In this respect, the Shimoda case decision may have "misunderstood" the principle prohibiting "unnecessary suffering. However, even in the 1996 Nuclear Weapons Advisory Opinion, some commentators stated that this principle also covers civilians. Whether the principle's protection now extends to civilians is an issue that should be carefully considered. It should be noted, however, that in the case of the atomic bombings of Hiroshima and Nagasaki, as mentioned above, the bombings amounted to indiscriminate attack and were already illegal.

### C. Precautions in Attack

It is unclear whether there were established rules requiring precaution under the laws of war at the time in regulating the methods and means of warfare. Even if so, no warning was given by the U.S. military for the atomic bombings of Hiroshima and Nagasaki.

Although mock bombs (pumpkin bombs) were dropped by the U.S. military, they were not intended as a warning.

## III. Examination of circumstances precluding wrongfulness

The atomic bombings of Hiroshima and Nagasaki, in light of the principle of distinction regarding military objectives, constitute "indiscriminate attack" and are illegal.

However, it is necessary here to examine the circumstances precluding wrongfulness. In particular, justification by "military necessity" and justification by reprisal (belligerent reprisal).

### A. military necessity

First, "military necessity" does not mean the necessity of winning the war itself. In this sense, "military necessity" is the same as the so-called German "Kriegsraison," which has been rejected by many commentators as undermining the validity of the laws of war. It has also been rejected by the postwar war tribunals.

Some of the laws of war, however, refer to "military necessity". An example is Article 23(g) of the Hague Regulations on Land Warfare, which is said to have become customary law, which prohibits the destruction or seizure of enemy property except when "the necessities of war" make it unavoidable. In this case, destruction is permissible to the extent provided herein. However, Article 25 of the same Land Warfare Regulations prohibits attacks on undefended towns, and there is no exception due to "military necessity". Thus, "military necessity" permits measures that are actually necessary to achieve a legitimate military purpose and are not prohibited by the laws of war. And the only legitimate military purpose is "to weaken the military forces of the enemy".

However, mainly in the United States, there is a prevailing discourse that the atomic bombings of Hiroshima and Nagasaki brought an early end to the war and saved the lives of American soldiers (and Japanese people) who would have been lost if the war had continued. This argument suggests that, from a legal standpoint, the early termination of the war and the saving of lives that would have been lost if the war had continued constituted a "military necessity" and thus justified the (originally illegal) dropping of the atomic bombs. This issue needs to be examined.

First, as a matter of fact, the question is whether the atomic bombings brought about the end of the war. In fact, when Japan accepted the Potsdam Declaration, the war's end imperial rescript made reference to the atomic bombings. However, historical research shows



that the atomic bombings were not the only decisive factor in Japan's acceptance of the Potsdam Declaration.

Secondly, what if, hypothetically, Japan had accepted defeat as a result of the atomic bombings, i.e. the US had won the war? In the first place, it is natural that wars are fought by each belligerents with the aim of achieving victory. However, the laws of war do not allow any means or methods to achieve the goal of victory. Certain restrictions were imposed thereon in order to "alleviat[e] as much as possible the calamities of war" (Preamble to the St Petersburg Declaration). If violations of the laws of war are justified by the goal of winning the war, it is the same as the aforementioned theory of "Kriegsraeson". If the laws of war are justified by the goal of winning the war, then it is as if there were no restrictions on the methods and means of combat, and the validity of the laws of war would be lost. The necessity of winning the war (ending the war) cannot be used as a justification for violating the laws of war.

## B. Reprisals

Next, we will examine justification by reprisal. This is because there are discourses that justify the atomic bombings as retaliation for Japan's Pearl Harbor attack and abusive acts against POWs, civilians, and others. For example, the Cairo Declaration refers to the restraint and punishment of Japanese aggression. In this case, however, it is not the atomic bombing but the war by the U.S. against Japan itself that is opposed to the illegality on *jus ad bellum*, which is justified by "self-defense". To justify the atomic bombings with Pearl Harbor is to confuse *jus ad bellum* with *jus in bello*.

Reprisals (belligerent reprisals) have long been established as a system to ensure the effectiveness of international law. Reprisals are inherently illegal acts committed with the purpose of causing the cessation of an illegal act by an opponent, and therefore strict requirements are necessary.

A particularly important requirement is proportionality. Can the atomic bombings be justified as reprisal for the Japanese military's violation of the laws of war in the war against the U.S.?

It may be difficult to compare the damage caused by the atomic bombings with the damage caused by the violations of the laws of war by the Japanese military, which occurred over a vast area in the Pacific and neighboring countries, if one looks only at the damage from casualties. However, the radiation damage that has continued to occur in the postwar period is out of balance even as reprisal.

In terms of another requirement, namely that it was aimed at the cessation of prior illegal acts, the atomic bombings do not fulfil this requirement. This is because there is no record on the part of the United States that the aim was to stop Japan from committing illegal acts.

In addition to this, consent is also considered as a circumstance precluding wrongfulness. It is true that under Article 19 of the Treaty of Peace with Japan, Japan waved all claims against the United States. However, this is an agreement regarding the handling of claims, and does not include a judgment on the legality of the causal acts that were the basis for the claims. In addition, immediately after the atomic bombings, the Japanese government sent a diplomatic memorandum claiming the illegality of the atomic bombings in light of international law to the US government.

Furthermore, the justification by "extreme circumstances of self-defense" suggested by the ICJ might be considered, but given the war situation at the time, the U.S. forces clearly had the advantage, and there were no "extreme circumstances of self-defense" that would justify the atomic bombings.

## Conclusion

In short, in 1945, i.e., at the time of the atomic bombings of Hiroshima and Nagasaki, the laws of war (international laws of war) were to be applied equally between Japan and the United States, the belligerents. Among the laws of war, the principle of distinction regarding military objectives and the principle of prohibition of unnecessary suffering were established as customary international law. In light of these principles, it is legally possible to determine the legality of the individual acts of dropping the atomic bombs on Hiroshima and Nagasaki, and in light of these principles, the atomic bombings of Hiroshima and Nagasaki, based on the indiscriminate effects of the bombs, violated the distinction principle, and based on the radiation damage that continued to occur after the war, violated the prohibition of "unnecessary suffering". The atomic bombings of Hiroshima and Nagasaki, based on the indiscriminate effects of the atomic bombs, violate the principle of distinction. Furthermore, in this regard, justifying the early termination of war and the saving of large numbers of lives as a military necessity denies the *raison d'etre* of the laws of war and cannot be accepted. Furthermore, justifying the acts as reprisals for the violation of the laws of war by the Japanese military cannot be accepted because it does not satisfy the requirement of reprisal.

Therefore, the atomic bombings of Hiroshima and Nagasaki were illegal under the customary international law at the time of 1945.