The Illegality of the Atomic Bombings of Hiroshima and Nagasaki from the Perspective of Customary International Law at the Time of 1945

A Discussion of Toshinori Yamada's paper

By Dr. Daniel Rietiker (Lausanne University,

Co-President of International Association of Lawyers against Nuclear Arms (IALANA)

Introductory remarks

I am very honoured and happy to be invited to react to Toshinori Yamada's excellent and well reflected paper on the "Illegality of the Atomic Bombings of Hiroshima and Nagasaki from the Perspective of Customary International Law at the Time of 1945". I can already say at this point that I am sharing his main conclusion according to which that the bombing of these two Japanese towns in August 1945 has been illegal under international customary law at it was established at that moment. I also agree that the *Shimoda Judgment* of the Tokyo District Court in 1963 serves as a serious starting point for the discussion. And I also think that, for the present discussion, we can use the definition of customary law in the sense of the ICJ Statute (Article 38 § 1 b)[1], that took over the wording of the Statute of the Permanent Court of International Justice.

In the present paper, I am briefly reacting to some of Toshinori's arguments and elaborating some additional thoughts.

I. Absence of a customary rule specifically prohibiting the use of nuclear weapons in 1945

Very early, the use of specific weapons has been limited and prohibited by specific treaties, which either codified existing customary law or later turned into a parallel customary rule. The 1925 Geneva Protocol[2] is such an example. The question can be raised whether in August 1945 such a rule existed in the field of nuclear weapons? The answer is clearly negative. Nuclear weapons have been conceptualized, manufactured and tested during the early 1940s under the "Manhattan Project" and the first explosion of such a bomb occurred in Alomogordo (New Mexico) on 16 July 1945. As a result, there was not enough time for the establishment of a new customary rule prohibiting their use by a state practice expressing an *opinio juris* in this sense until the nuclear attacks on Hiroshima and Nagasaki in August 1945.

Moreover, there was, at that moment, no rule in place that could be compared to Article 36 of Additional Protocol I to the 1949 Geneva Conventions, according to which, "in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High

[1] "International Custom, as evidence of a general practice accepted as law."

[2] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Parties." In addition, an analogous rule to Common Article 1 to the Geneva Conventions, imposing on the States Parties the duty "*to respect and to ensure respect* for the present Convention *in all circumstances*", did not exist neither in 1945.

And even today, almost 80 years later, it is far from evident to claim the existence of a customary rule prohibiting the use of nuclear weapons. Once the Treaty on the Prohibition of Nuclear Weapons having received an overwhelming number of ratifications, such a rule might be easier to prove.

In the absence of a specific customary rule prohibiting nuclear weapons in August 1945, does this mean that there was no law in place, in particular deriving from international humanitarian law (IHL), sanctioning the humanitarian catastrophe caused by the bombing of Hiroshima and Nagasaki? In other words, are we in the logic of the *Lotus* principle, according to which everything that is not forbidden is allowed?[3] The *Shimoda* judgment actually reaffirmed this principle as such in the following terms:

"Of course, it is right that the use of a new weapon is legal, as long as international law does not prohibit it."[4]

And still in 1996, in the Advisory Opinion on the *Legality of the Threat or Use Of Nuclear Weapons*, the majority of the Judges of the ICJ were of the opinion that the law is not clear on this issue, concluding that:

"There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such (…)"[5]

However, in the specific field of IHL, with the aim of limiting the suffering of combatants and the civil population in armed conflict, States and legal experts have been – and still are – aware that the logic must be another one and that, in the absence of a specific rule prohibiting a certain type of weapons, this does not mean that their use is necessarily legal.

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[3] *The Case of the S.S. "Lotus" (France v. Turkey),* Collection of Judgments of the PCIJ, Series A No. 10, 7 September 1927: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed*" (p. 18)

[4] English version of the Judgment, see Japanese Annual of International Law for 1964, pp. 212- 252, at p. 235.

[5] Operative paragraph 2 A and B of the opinion.

II. The relevance of the "Martens Clause"

Wider principles of international law underlie the specific rules and, if the use of a new weapon violates these principles, it violates international law without requiring any specific rule.[6] The *Shimoda* judgment reaffirmed this by considering that

"we cannot regard a weapon as legal only because it is a new weapon and it is still right that a new weapon must be exposed to the examination of positive international law."[7]

That is where the "Martens Clause" demonstrates all its relevance. Toshinori explains well the relevance of this rule in the context of nuclear weapons. It was in fact enshrined for the first time in the 1899 Hague Convention on the laws and customs of war on land (II), which codified existing customary international law. It was therefore directly relevant for the bombings occurring in August 1945. Its wording is as follows:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

It is obvious that the scenario of the bombing of the two Japanese towns fit perfectly into the logic of this clause. The extreme material loss and human suffering that caused the dropping of the two bombs on Hiroshima and Nagasaki can be adequately expressed by the following extracts from the journal written by the ICRC's Doctor Marcel Junod, the first foreign doctor to reach Hiroshima after the atomic attack on 6 August:[8]

"At twelve o'clock, we flew over Hiroshima. We… witnessed a site totally unlike anything we had ever seen before. The centre of the city was a sort of white patch, flattened and smooth like the palm of a hand. Nothing remained. The slightest trace of houses seemed to have disappeared. (…)

In a few seconds … thousands of human beings in the streets and gardens in the town centre, struck by a wave of intense heat, died like flies. (…) All private houses, warehouses, etc, disappeared as if swept away by a supernatural power. Trams were picked up and hurled yards away, as if they were weightless; trains were flung off the rails (…)."

It is my understanding that the Martens Clause, especially by referring to the "laws of humanity and the requirements of public conscience", is relevant for the present discussion insofar as it fills

[6] Richard A. Falk, The *Shimoda* Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki, AJIL, 1965, Vol. 59, pp. 759-793, 771.
[7] Page 236.
[8] The Hiroshima disaster – a doctor's account, Extracts from the journal written by the ICRC's Dr. Marcel Junod, the first foreign doctor to reach Hiroshima after the atom bomb attack on 6 August 1945, and to treat some of the victims: The Hiroshima disaster – a doctor's account - ICRC

a normative gap caused by the absence of a specific regulation.[9] The ICJ in its 1996 Advisory Opinion considered that "it has proved to be an effective means of addressing the rapid evolution of military technology."[10]

III. General Principles of IHL

Toshinori explains in a very convincing manner that, in the absence of a specific rule under customary international law prohibiting or authorizing the use of nuclear weapons at that time, recourse has to be made to general principles of IHL, in addition to the Martens Clause. It is also relevant to point out that these principles are today mentioned in the Preamble of the TPNW.

A. Principle of distinction

First of all, he refers to the principle of distinction, according to which States must never make civilians the object of attack and, therefore, never use weapons that are incapable of distinguishing between civilian military targets.[11] This principle is underlying in Article 25 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land,[12] considered customary in nature in 1945.[13] The *Shimoda* judgment, based on this principle, held that "the act of atomic bombing and undefended city…should be regarded in the same light as a blind aerial bombardment; and it must be said to be a hostile act contrary to international law of the day."[14]

Moreover, according to the ICJ in 1996, "the destructive power of nuclear weapons cannot be contained in either space or time."[15]

More specific rules derive from the principle of distinction, for example the rule that medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. This rule goes back to the protection of "hospitals and places where the sick and wounded are collected" in Article 27 of the Hague Convention (IV) and was, therefore, applicable to the bombings of Hiroshima and Nagasaki.[16] In light of the above mentioned journal written by the ICRC doctor Marcel Junod, the relevance of this rule for these attacks becomes evident:

This emergency hospital is in a half-demolished school. There are many holes in the roof. On that day, it was pouring with rain and water was dripping into the patients' rooms. Those who had the

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[9] In other words, the Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law (Rupert Ticehurst, The Martens Clause and the Laws of Armed Conflict, IRRC, no. 317).
[10] ICJ Reports 1996, § 78.
[11] ICJ Reports 1996, § 78.
[12] The Regulations are an Annex to the 1907 Hague Convention (IV).
[13] The *Shimoda* judgement concluded that the 1907 Hague Convention (IV) was applicable to the bombings of Hiroshima and Nagasaki considering that the rules governing land warfare "analogically apply since the aerial bombardment is made on land." (p. 238).
[14] Page 239.
[15] ICJ Reports 1996, § 35.
[16] Today, it is also covered by Article 19 of the First Geneva Convention, Article 18 of the Fourth Geneva Convention as well as Article 12 of Additional Protocol No. 1.

strength to move huddled in sheltered corners, while the others lay on some kind of pallets; these were the dying. (…)

The medical care is rudimentary; dressings are made of coarse cloth. A few jars of medicine are lying around on a shelf. The injured often have uncovered wounds and thousands of flies settle on them and buzz around. Everything is incredibly filthy. Several patients are suffering from the delayed effects of radioactivity with multiple haemorrhages. They need small blood transfusions at regular intervals; but there are no donors, no doctors to determine the compatibility of the blood groups; consequently, there is no treatment. (…)

One of the Japanese doctors told me that a thousand patients had been taken in on the day of the disaster: six hundred had died almost immediately and had been buried elsewhere, in the immediate vicinity of the hospital. At present, only two hundred remained. There were no blood transfusions because there was no equipment to carry out examinations and the donors had either died or disappeared. (…)

Finally, Dr. Junod noted the consequences of the bomb for Hiroshima's medical corp: out of 300 doctors, 270 died or were injured; out of 1 780 nurses, 1 654 perished or were injured.[17]

In other words, bombing entire towns with nuclear weapons, of which the indiscriminate effect is well known, means that attacks against medical units are accepted, which runs contrary to the above mentioned IHL rules. It is also noteworthy to mention, in this regard, that the "Humanitarian Initiative" that led to the negotiations and adoption of the TPNW in July 2017 brought upon new evidence for the destructive power of nuclear weapons and for the inability to assist victims of nuclear explosions.[18]

B. Principle prohibiting to inflict superfluous injury or unnecessary suffering

Moreover, Toshinori stresses very pertinently the principle according to which it is forbidden to inflict superfluous injury or unnecessary suffering for the context of nuclear weapons, a principle that is today codified in Article 35 § 2 of Additional Protocol No. 1. But already the "St. Petersburg Declaration" adopted in 1868, confirmed the customary rule according to which the use of arms, projectiles and material of a nature to cause unnecessary suffering is prohibited. The 1907 Hague Regulations respecting the Laws and Customs of War on Land actually prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Article 23 e).

As the ICJ held in 1996, a nuclear weapon, by its very nature, not only releases immense quantities of heat and energy, but also powerful and prolonged radiation. Moreover, "[t]hey have the potential to destroy al1 civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very

[17] The Hiroshima disaster – a doctor's account, cited above.
[18] See, among others, the new research presented at the Humanitarian Impact Conferences in Oslo, Nayarit and Vienna, held in 2013 and 2014.

wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations (…)."[19]

As a result, the nuclear attacks against Hiroshima and Nagasaki clearly run against the prohibition of superfluous injury or unnecessary suffering. This was also the view of the *Shimoda* judgment that based its considerations on a comparison with the use in war of asphyxiating, poisonous and other gases, enshrined in particular in the 1925 Geneva Protocol, considered customary in nature as mentioned above. The Tokyo District Court held as follows:

"It is not too much to say that the pain brought by the atomic bombs is severer than that fom poison and poison-gas, and we can say that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that unnecessary pain must not be given."[20]

C. Principle according to which the right to choose methods or means of warfare is not unlimited

In addition to the two principles rightly explained by Toshinori, I would also refer to the principle that the right of the Parties to a conflict to choose methods or means of warfare is not unlimited, which is probably the most basic, overarching principle. It is today enshrined in Article 35 § 1 of Additional Protocol No. 1, but has a long history. Grotius in his work "*De iure belli ac pacis*", published in 1625, demonstrated the necessity of "*temperamenta belli*", i.e. of imposing limitations on the destructive power of weapons to be used.[21] At that time, Europe was plunged in the horrors of the Thirty Years' War, which had often been considered as "total war". Later, it was enshrined in Article 22 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land:

"The right of belligerents to adopt means of injuring the enemy is not unlimited."

There are no exceptions to this fundamental rule. Otherwise, one would enter the realm of arbitrary behavior, i.e. an area where law does not exist, whether this was intended or not.[22] Of course, it is quite another matter to determine the actual scope of the principle, which may differ with the times, depending on the prevalent customs and treaties.

In fact, a number of different theories seek to contest the validity of the principle according to which the right of the belligerents to choose of methods or means of warfare is not unlimited, in particular the so-called "*Kriegsraison*", a "state of necessity", military necessity, or the right to reprisals. Toshinori very convincingly argues why these theories cannot be invoked to set aside the fundamental principles of humanity, expressed, in particular by the Martens Clause, as discussed above.

[19] ICJ Reports 1996, §35.
[20] Pages 241-242.
[21] Commentary of Article 35 of Additional Protocol No. 1, ICRC, Paragraph 1383.
[22] Ibidem., paragraph 1385.

Just a thought on "*Kriegsraison*": This theory is best expressed by the maxim "*Kriegsraison geht vor Kriegsmanier*", which can be translated into "the necessities of war take precedence over the rules of war", implying that the commander on the battlefield can decide in every case whether the rules will be respected or ignored, depending on the demands of the military situation at the time. It is obvious that, by granting such an unfettered freedom, the law would cease to exist.[23] It is for this reason that the theory was condemned in Nuremberg.[24]

The theory of military necessity gives military commanders some freedom of judgment if, and only if, this is explicitly provided for by the rule in question.[25] Toshinori points out to Article 23(g) of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, which prohibits the destruction or seizure of enemy property, unless such destruction or seizure "be imperatively demanded by the necessities of war." But the concept is always limited to measures which are essential to ensure the success of the planned operation; moreover, it is always subject to other rules of international law potentially applicable, as well as to the Martens Clause.[26]

D. Principle imposing precaution in attack

A last principle that Toshinori briefly mentions is precaution in attack. He considers is unclear whether a customary rule existed at the time of the bombings of Hiroshima and Nagasaki. I tend to agree with him. The rule is today codified in Article 57 § 1 of Additional Protocol No. 1 and was first set out in Article 2 § 3 of the 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War. Considering the concrete circumstances, that treaty did not apply to the Hiroshima and Nagasaki bombings. However, there exists, by virtue of Article 26 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the duty of the officer in command of an attacking force, before commencing a bombardment, to "do all in his power to warn the authorities", except in cases of assault. Toshinori argues that such a warning has not been given before the United States commenced the attacks against the two Japanese towns.

IV. Other domains of international law prohibiting the use of nuclear weapons in August 1945, in particular human rights law?

IHL is not the only branch of international law that is relevant in the context of the use of nuclear weapons. The ICJ, in its Advisory Opinion of 1996, also referred to *jus ad bellum*, environmental law and human rights law. All these domains would be worth being examined more in details in the present analysis, but for practical reasons, I limit myself to some brief remarks on human rights law.

[23] Ibidem., paragraph 1386.
[24] Ibidem.
[25] Ibidem., paragraph 1405.
[26] Ibidem., paragraph 1406.

It was in 1945 when fundamental rights, such as the right to life, were first reflected in international law.[27] The UN Charter was adopted in San Francisco on 26 June 1945 and entered into force 24 October 1945, following, and predominantly, in response to the ravages of World War II and the Holocaust. Its preamble noted the determination of the peoples of the UN "to reaffirm faith in fundamental human rights…(and) in the dignity and worth of the human person."[28] In 1948, the Universal Declaration of Human Rights (UDHR) was adopted, of which Article 3 affirms that "everyone has the right to life, liberty and security of person." At the moment of adoption, the UDHR was a non-binding instrument. Many of its provisions, if not all, became customary law only later.[29]

In its Advisory Opinion rendered in 1996, the ICJ held that the right to life, enshrined *inter alia* in Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR), does not cease to exist in times of war.[30] In addition, quite recently, the Human Rights Committee, implementing the ICCPR, stated what follows in the context of its General Comment No. 36 on the Right to Life:

"The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law."[31]

I have extensively explained elsewhere that the use of nuclear weapons would doubtlessly violate various human rights on a massive scale, including peremptory norms of international law, such as the right not to be subject to inhuman and degrading treatment, including torture.[32] Judge Weeramantry, in his convincing dissenting vote on the 1996 Advisory Opinion, used language inspired by human rights and dignity :

" (…) when a weapon has the potential to kill between one million and one billion people, as WHO has told the Court, human life becomes reduced to a level of worthlessness that totally belies human dignity, as understood in any culture. Such a deliberate action by a State is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which would world peace depend, and respect for which is assumed on the part of all Member States of the United Nations (…)."

However, as Toshinori pertinently recalls, the principle of non-retroactivity must be respected. As a result, the bombing of Hiroshima and Nagasaki must be assessed in the light of the international law applicable at that time. As it has been said above, human rights are largely a product of the

[27] Stuart Casey-Maslen, The Right to Life under International Law, An Interpretative Manual, Cambridge University Press, 2021, p. 9.
[28] Second preambular paragraph.
[29] Casey-Maslen, cited above, pp. 9-10.
[30] ICJ Reports 1996, § 25.
[31] UN Doc. CCPR/C/GC/36, adopted by the Committee at its 124th session (8 October–2 November 2018).
[32] Daniel Rietiker, *Humanization of Arms Control, Paving the Way for a World Free of Nuclear Weapons*, Routledge 2018.

atrocities of World War II and the Holocaust, with the adoption of the UDHR in 1948 as a starting point of this new development. As a result, it cannot be said that, in August 1945, there existed a right to life in the modern sense, which would, as such, have rendered the bombings of the two Japanese towns illegal.

This has also to do with the fact that, in those days, the human being was not yet considered a subject of international law possessing legal capacity, as has been recalled in the *Shimoda* case, rendered in 1968, in the context of the question whether the victims of the Hiroshima and Nagasaki bombings were entitled to seek compensation as a consequence of the violation of international law caused by these illegal acts:

"It is proper to understand that individuals are not the subject of rights in international law, unless it is concretely recognized by treaties."[33]

General conclusions

In terms of conclusions, it can be reiterated that no specific prohibition existed in 1945 that would have prohibited the use of nuclear weapons against the towns of Hiroshima and Nagasaki. As Toshinori eloquently explained, the Martens Clause and the general principles of IHL deriving from the relevant treaties, but customary in nature too, were nevertheless applicable to the bombings and, as a result, rendered them illegal under international law of that period. The *Shimoda* judgment, rendered in 1963, constitutes a significant precedent in this regard.

Human rights law, on the other hand, was not developed enough at the material time in order to be a relevant factor. Finally, the question whether other rules of international law, deriving from *jus ad bellum* or environmental law, limited or prohibited the use of nuclear weapons in 1945, has been left open.

[33] Page 245.