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部会①核兵器をめぐる今日的課題

「国際司法における核兵器：マーシャル諸島の提訴の意義」

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参考資料

資料 1

国際司法裁判所規定（抜粋）

第 36 条

1. 裁判所の管轄は、当事者が裁判所に付託するすべての事件及び国際連合憲章又は現行諸条約に特に規定するすべての事項に及ぶ。
2. この規程の当事国である国は、次の事項に関するすべての法律的紛争についての裁判所の管轄を同一の義務を受諾する他の国に対する関係において当然に且つ特別の合意なしに義務的であると認めることを、いつでも宣言することができる。
 - a. 条約の解釈
 - b. 国際法上の問題
 - c. 認定されれば国際義務の違反となるような事実の存在
 - d. 国際義務の違反に対する賠償の性質又は範囲
3. 前記の宣言は、無条件で、多数の国若しくは一定の国との相互条件で、又は一定の期間を付して行うことができる。
4. その宣言書は、国際連合事務総長に寄託され、事務総長は、その謄本を規程の当事国及び裁判所書記に送付する。
5. 常設国際司法裁判所規程第三十六条に基いて行われた宣言でなお効力を有するものは、この規程の当事国の間では、宣言が今後存続すべき期間中及び宣言の条項に従って国際司法裁判所の義務的管轄を受諾しているものとみなす。
6. 裁判所が管轄権を有するかどうかについては争がある場合には、裁判所の裁判で決定する。

第 38 条

1. 裁判所は、付託される紛争を国際法に従って裁判することを任務とし、次のものを適用する。
 - a. 一般又は特別の国際条約で係争国が明らかに認めた規則を確立しているもの
 - b. 法として認められた一般慣行の証拠としての国際慣習
 - c. 文明国が認めた法の一般原則
 - d. 法則決定の補助手段としての裁判上の判決及び諸国の最も優秀な国際法学者の学説。但し、第五十九条の規定に従うことを条件とする。
2. この規定は、当事者の合意があるときは、裁判所が衡平及び善に基いて裁判をする権限を害するものではない。

第 59 条

裁判所の裁判は、当事者間において且つその特定の事件に関してのみ拘束力を有する。

第 63 条

1. 事件に関係する国以外の国が当事国である条約の解釈が問題となる場合には、裁判所書記は、直ちにこれらのすべての国に通告する。
2. この通告を受けた各国は、手続に参加する権利を有するが、この権利を行使した場合には、判決によって与えられる解釈は、その国もひとしく拘束する。

第 65 条

1. 裁判所は、国際連合憲章によって又は同憲章に従って要請することを許可される団体の要請があったときは、いかなる法律問題についても勧告的意見を与えることができる。

資料 2

LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT : ADVISORY OPINION OF 8 JULY 1996

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a "legal question" within the meaning of its Statute and the United Nations Charter. The Court has already had occasion to indicate that questions "framed in terms of law and rais[ing] problems of international law. . . are by their very nature susceptible of a reply based on law . . . Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction - which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use - and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction - which prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of

recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter. when its survival is at stake.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the CO-operation of all States.

(2) Replies in the following manner to the question put by the General Assembly :

A. Unanimously,

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

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

.....

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful ;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons ;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

.....

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

資料 3

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT: APPLICATION INSTITUTING PROCEEDINGS AGAINST THE UNITED KINGDOM) BY THE MARCHALL ISLANDS

2. This Application is not an attempt to re-open the question of the legality of nuclear weapons addressed by this Court in its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons. Rather, the focus of this Application is the failure to fulfil the obligations enshrined in Article VI of the NPT and customary international law; and particularly the failure of the NPT nuclear-weapon States to keep their part of the strategic bargain and do what the Court unanimously called for based on its analysis of Article VI, namely “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”

6. Equally, a coherent and civilized legal system cannot tolerate unacceptable harm to humanity. A lawful and sustainable world order is predicated on a civilizational right to survival rooted in “the principles of humanity” and “elementary considerations of humanity” which help to shape an emerging “law of humanity”, the international law for humankind of which the nuclear disarmament obligation is a key element. Yet it is now 68 years since the very first United Nations General Assembly Resolution sought to put in motion the elimination from national arsenal of nuclear weapons and other

weapons of mass destruction, almost 45 years since the NPT entered into force and nearly 20 years since the Court delivered its Advisory Opinion. The long delay in fulfilling the obligations enshrined in Article VI of the NPT constitutes a flagrant denial of human justice.

資料 4

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT: APPLICATION INSTITUTING PROCEEDINGS AGAINST INDIA BY THE MARSHALL ISLANDS

40. The court observed that “fulfilling the obligation expressed in Article V I... remains without any doubt an objective of vital importance to the whole of the international community today”. The Court has long emphasized the importance of obligations *erga omnes*. Every State has a legal interest in its timely performance, therefore, and a corresponding legal obligation to help bring it about. (Pakistan 35 同様)

41. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law. (Pakistan 36 同様)

44. The Court’s declaration is an expression of customary international law as it stands today. All States are under that obligation, therefore. This is consistent with the view expressed by President Bedjaoui in his Declaration: “Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a customary character”.(Pakistan 39 同様)

資料 5

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS v. UNITED KINGDOM)PRELIMINARY OBJECTIONS: JUDGEMENT

44. The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament (see paragraph 16 above). But that fact does not remove the need to establish that the conditions for the Court’s jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts

underlying its case that a dispute exists (Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 75, para. 16).

52. In all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.

53. Secondly, the Marshall Islands argues that the very filing of the Application could suffice to establish the existence of a dispute: “nothing excludes the possibility of conceiving the seisin of the Court as an appropriate and perfectly legitimate mode by which the injured State ‘notifies its claim’ to the State whose international responsibility is invoked”. It also points to other statements made in the course of the proceedings by both Parties as evidence of their opposition of views.

58. The Court therefore concludes that the first preliminary objection made by the United Kingdom must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is not necessary for the Court to deal with the other objections raised by the United Kingdom.

資料 6

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS v. INDIA) JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION: JUDGEMENT

54. The Court therefore concludes that the first objection made by India must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. (Pakistan 54)

55. Consequently, it is not necessary for the Court to deal with the other objections raised by India. The questions of the existence of and extent of customary international law obligations in the field of nuclear disarmament, and India’s compliance with such obligations, pertain to the merits. But the Court has found that no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions. (Pakistan 55)