A Supplementary Opinion

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I. INTRODUCTION

I concur with the court opinion. Following is my supplementary opinion to address four points.

I aim to reinforce the court opinion and to reaffirm the goal and the challenge the court has to accomplish by reiterating the historical statements and facts that seem self-evident.

Mr. Jackson, the U.S. Supreme Court Judge once stated as follows as the chief prosecutor at the International War Crimes Tribunal in Nürnberg.

"If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them and we are no prepared to lay down a rule of criminal conduct against others, which we would not be willing to have invoked against us…"

However, neither U.S. nor British leaders were prosecuted for aerial bombing on Dresden, Hamburg and other cities, which killed and wounded tens of thousands of civilians. The historic Nürnberg court was shadowed with the suspicions of being a trial by the victors. Further, nobody was prosecuted for the criminal liability of dropping atomic bombs on Hiroshima and Nagasaki at the International War Crimes Tribunal for Far East in Tokyo. Time has passed. Now we set up a tribunal to prosecute the U.S. President Bush for his illegal attack on Afghanistan.

II. GOALS AND CHALLENGES OF "PEACE BY THE RULE OF LAW"

In the first place, I would like to reaffirm that President Bush violated and destroyed "peace by the rule of law" taking advantage of the 9.11 strikes, in light of the goals and challenge of "the peace by the rule of law".

The Kellogg-Briand Pact concluded in 1928 is the embodiment of "peace by the rule of law", which totally prohibits a war.

The international society was struggling to establish the workable system to maintain the international peace and security by the developing the legal structure to prohibit wars since the conclusion of the Westphalia treaty in 1648. Having gone through the atrocities of the World War I, the world community adopted the collective security system for the first time in history with some awareness of the possible inadequacy. Under this system, various restrictions were imposed on the waging of war, such as the sanctions against a violator country, which, nevertheless, was a major revolution turning around the then prevailing view that every sovereign country has right of war.

The League of Nations played the central role in promoting this trend, thus the illegality of war prevailed in international conventions and treaties, for example, Draft Treaty of Mutual Assistance of 1923, Geneva Protocol of 1924, Treaty of Locarno in 1925, and the resolution of request for a disarmament conference of the same year. Particularly, the Kellogg-Briand

Pact of 1928 was an epoch-making treaty that introduced the concept of illegality of war under international law.

The Pact is a simple treaty, consisting of only three articles, Article 1, renunciation of war, Article 2, settlement of disputes by peaceful means, and Article 3 ratification and affiliation. As there is no provision for termination, it is still valid today. It is the treaty that determined the illegality of war, breaking off with the concept of war as sovereign nation's right.

And more than anything, the fact that more than 90 percent of the sovereign states signed it then, is indicative that the international society is desirous of "peace by the rule of law", and as the result, the new international norm that all wars are illegal was established. Further efforts continued toward realization of peace by the rule of law, relying on the basic concept of the Kellogg-Briand Pact.

That is to say, it manifests itself in the U.N. Chapter that defines the direction and the framework of UN activities after the Second World War, and the development and spread of international humanitarian law and/or human rights law to deal with ethnic conflicts and limited wars raging in every corner of the world.

In the meantime, outlawry of wars sharpened the awareness of the world citizens resulting in the first global anti-war movements against the Vietnam War. The Russell Court of 1967 is the accumulation of such activities in an effort to reexamine genocides and other crimes committed by the U.S. forces, which became the model for the People's Tribunal for Cambodia and the Women's International War Crimes Tribunal that followed.

Even today, people still continue to struggle in their efforts to realize the illegalization of war. With the background of a few people's courts as well as hoc courts including the International Criminal Court for Yugoslavia, and Rwanda, the International Criminal Court (ICC) was founded as the final embodiment of "peace by the rule of law" in March, 200.

Over 350 years have passed since the conclusion of the Westphalia treaty, and more than 75 years have passed since the ratification of the Kellogg-Briand Pact. The constant and steady efforts to "peace by the rule of law" will finally present itself in the concrete form of the International Criminal Court in this century.

However, this goal is going to be emasculated by President Bush. It is well known that President Bush expressed his outright objection to the establishment of the International Criminal Court. Now that the establishment is imminent, the United States, being apprehensive of possible prosecution of its own soldiers, are making every possible effort to put political pressure on the countries under its influence, by concluding bilateral agreements to obstruct the operation and the function of legal system.

Therefore, in this context, we are now faced with the challenges such as how our long-cherished "peace by the rule of law" should be protected, how should it be run efficiently, and how should it function effectively. The Afghan court is an attempt of the people to reaffirm the principle of peace by the rule of law as well as to assure its practice in the society at the transitional stage. It is a small project, yet it is an important one. Also this is why the court is significant.

III. IRRELEVANCY OF "NEW RIGTT-OF-SELF-DEFENSE CONCEPT"

Secondly, I will address to the validity of a "new right-of-self-defense" which is introduced as President Bush's legal tool for the "selective rule of the world" and will dispute the relevancy of the concept.

Triggered by the "9.11" incidents in the United States, the long and hard work of the world's people toward the outlawry of war and "peace by the rule of law" are at the risk of being infringed and destroyed. Some even propose to return to the primitive society where a just war theory is eagerly applied, exceeding the level of obstructing justice under international law. The Afghanistan war as well as the "Iraqi war" following 9.11 incidents has shaken the groundwork of the system that embodies peace by the rule of law.

President Bush adopted vague and indefinite standards in justifying his acts of aggression, interference in the regional disputes including ethnic conflicts, and suppression of separatist or independence wars in many parts of the world to establish the arbitrary and selective domination of the world. Then, he has avoided the liability for war crimes and crime against humanity, which were committed in his name.

As a "legal" tool to justify such retrogression to the antique theory of just war, bellum justum, the United States creates abstract concepts and their own interpretation including "humanitarian intervention" and "justice", which has no credible legal grounds.

To dilate on this point, I argue that there is no doubt that the 9.11 incidents were the terrorist attacks but never a war waged by a sovereign state upon any terms, although nothing was resolved yet about the 9.11 incidents. Primarily, a war is defined as a conflict between sovereign states. Thus the incidents in question do not constitute a war as defined under international law because they were acted out by a non-state party. The incident took place in the U.S. domain. So, I would dare say that the 9.11 incidents are hijackings of the U.S. commercial aircrafts which had taken off at U.S. airports, whatever large scale devastation were caused by them. This means that the case is within the U.S. jurisdiction. Therefore, they should be fundamentally prosecuted under the U.S. domestic law and penal procedures in the U.S. territory.

Specifically, the matters should have been dealt with based on the Convention for the Suppression of the Unlawful Seizure of Aircraft or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. If the United States had chosen the method, overwhelming majority of the world including Arab countries, would have supported the U.S. investigations.

Instead, President Bush ordered to launch the war of reprisal in response to the criminal acts that come under domestic jurisdiction. He completely disregards the rule that an armed attack by a sovereign state is pre-requisite to the execution of right-of-self-defense along with application of the rule of urgency and proportionality under international law.

Declaration on Principles of International Law Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625) adopted by the United Nations General Assembly in 1970 says, "States have a duty to refrain from acts of reprisal involving the use of force", which prohibits the use of bare military force for reprisals.

As is widely known, under the U.N. Chapter that is one of the groundwork for peace for the rule of law, it is illegal to use force except for two occasions. Some of them are military measures enforced by the decision of Security Council against the acts of aggression, destruction of peace, and threat to peace. However, no right of pre-emptive strike is permitted. The second exception is the inherent right of individual or collective self-defense if an armed attack occurs against a nation state, until the Security Council has taken necessary (Article 51).

The Afghanistan war, even in consideration of very complicated international network, does not satisfy the requirements to qualify exception. Under today's international law, President Bush cannot possibly justify his acts legally by whatever logic and rhetoric he employs.

Incidentally, I would like to introduce a view that even small scale terrorist acts could amount to use of force by a sovereign state when they effectively induce impacts comparable to a military attack by a state (armed force) after repeated occurrences and in such case, the injured has the right to self-defense. It is called "the theory of the accumulative crisis." (Ref. to Yasuhiko Miyauchi "An opinion on the retaliatory bombing to international terrorist's act", Kokugakuin Univ. Law Journal Vol.38, No.1)

However, even if individual groups repeatedly commit acts of terrorism many times, they are not usually taken as equivalent to the use of military force of the sovereign state. Involvement of a sovereign state needs to be established to claim that the act was committed by the state.

In the involvement of a sovereign state, there are four steps, direct participation by (1) support as well as (2) assistance and indirect participation by (3) tolerance or negligence as well as (4) lack of ability.

Of the above, (3) points to the country which does not take the necessary action to deter the act of violence although support is not offered and (4) means that due to inadequacy of armed forces or the police, the state cannot respond to the acts of terrorism inside the country.

If we call a country with minimum or low-level involvement as " terrorism supporter country" or a "terrorism sympathizer state", and permit the injured country to use the military force, "peace by the rule of law" will collapse. Therefore, the theory is not applicable.

Furthermore, Professor David Rodin of Oxford University severely criticizes that sovereign state's right of self-defense cannot be justified by simple analogy to the right of individual self-defense in his new book. He advocates the new framework of regulating the use of force at the international scenes neither by pointing out that a war in defense of the nation cannot be justified as collective defense nor by analogy to inherent right of individual's self-defense. (War and Self-Defense and Oxford 2002).

In view of newly emerging studies, the theory that President Bush uses for justification of self-defense seems quite feeble.

IV. HOW CAN WE ELIMINATE TERRORISM FROM THE SURFACE OF THE EARTH?

Third question is how we should deal with terrorism then. Ernst-Otto Czempiel of Germany advocates the transfer from the world of nation states to the world of society. He comments that the 9.11 strikes indicate that a partisan war has been converted to its modern form making

adjustments to the globalized world. He also said,

> Terrorism has its root in the economic exploitation of the Third World. Politics has been localized while economy globalized. He emphasized that globalization of economy is rebounded upon the politics, result of which is the globalized terrorism today. Czempiel further argues that Iraq must resume the membership of the international society to begin with. What the world must understand is that it is neither armored vehicles nor anti-aircraft missiles but re-distribution of wealth that protect the just order of the peaceful world. And only the aids to developing countries can create safety and security.
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> (Die tageszeitung vom 14.9.2001; Weltpolitik im Umbruch—Die Pax Americana, der Terrorismus und die Zukunft der internationalen Beziehungen, 2002)

Nevertheless, President Bush launched attacks on Afghanistan under the primitive principle of violence to violence, waged a war on Iraq ignoring the protest and opposition of the international society, and violently ruined the country of Iraq, rather than restoring Iraq to the international community. Whatever President Bush did was contrary to the prescription written by Czempiel. "Use of power gives nutrition to grow new terrorism and spread terrorism through network."

I must refer to the words of Pierre Hassner, French political scientist,

> "When a civilized world gets involved with a barbaric world in a war, a danger arises that civilized countries themselves get barbarized, too."
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> (Frankfurter Rundschau vom 14.9.2001)

Richard Rorty, an American philosopher, compared the 9.11 incidents to the arson incident on German Parliament. On February 27, 1933, taking advantage of the incendiarism, the Nazis issued the emergency order to stop constitutional fundamental rights of the German citizens the next day, striking the first blow to the system of the Weimar Republic.

Rorty declared, "The constant state of emergency brings about the slow decay of democracy", in his speech analyzing the situation after 9.11 strikes entitled "terrorism, international law, and the limitation of democracy", at the Potsdam forum in this March. I call your attention to his warning that a "war against the terror" could be more devastating to democracy than to Al Qaeda (Sueddeutsche Zeitung vom 8.3.2004).

Human Rights Watch, an American NGO, reported the recent conditions of serious human rights abuses in Afghanistan, Iraqi civilians detained or tortured and Iraqi houses searched without a warrant by the U.S. Forces. Moreover, about 650 detainees from 42 nations are held in the Guantanamo Bay of Cuba now, without benefit of being treated as prisoners of war or criminal suspects. In early March, the U.S. government handed over five British nationals to the British authorities, but they are still in custody. They say that they are restrained because they are members of Al Qaeda or Taliban soldiers, which constitutes no legal basis for detention.

The United States calls itself as the most democratic country of all states. But to the outside world, it looks like the worst abuser of human rights of foreigners. Also within the country, practice of human rights abuse is getting aggravated by enactment of Patriot Act that imposes restrictions on U.S. citizens, immigrants and travelers.

While the action by the principle of violence to violence brought about the cycle of violence,

Spain, one of willing partners of the coalition, became the target of terrorism tragically. Is it by accident that the "3.11" attack on railway in Madrid took place a half year prior to the third anniversary of the 9.11 strike? How can we cut off the cycle of violence?

A possible solution lies in the resolution adopted by the city of Berkeley in California, U.S.A. on October 16, 2001 calling for cessation of the U.S. aerial campaign on Afghanistan.

The resolution condemned the mass murder of September 11, 2001, and praised the heroic rescue efforts. It asked the Congress to break the cycle of violence, bringing an end to bombing in Afghanistan immediately, avoiding actions that can endanger the lives of innocent people in Afghanistan, and minimizing the risk to American military personnel. And it urged the Congress to make efforts for bringing the perpetrators to justice with the cooperation of the international community.

Also it urged the Congress to devote the best efforts in collaboration with governments of the world, on overcoming poverty, malnutrition, disease, oppression, and subjugation that tend to cause terrorism. In conclusion, it proposed a national campaign to lessen U.S. dependence on oil from the Middle East and to convert renewable energy sources nationwide in five years.

It is significantly useful to seek out the legally available measures to grapple with the situation in a levelheaded manner with collaboration with the governments of the world, instead of frantically venturing into reprisal frightened or on the excuse of being frightened by the brutal terrorism. Especially, we need to pay attention to the causes of terrorism for permanent resolution of the issue.

Based on the understanding that terrorism would never cease to trouble the world as long as people fight over oil in the Middle East, citizens of Berkeley proposed the conversion from oil to renewable energy sources such as solar energy. They offered the fundamental plan and viewpoint required to maintain the lasting safety and security of civic society. (Ref. "Straight Advice to Contemporaries" by Asaho Mizushima, Kobunken, 2003).

Defendant President Bush should read carefully the small but brilliant resolution which municipal assembly adopted.

V. IS JAPANESE PUBLIC QUALIFIED TO PROSECUTE PRESIDENT BUSH?

Here is my last word.

Amicus Curiae said,

> "The public of the world accepts President Bush as the matter of reality while Japanese public let Junichiro Koizumi hold on to the political power and support the U.S. attacks on Afghanistan. Such accommodating Japanese people have no rights to pursue the liability of President Bush."

I say,

> But, not all the Japanese nationals support the Koizumi administration. Increasing number of Japanese voters is beginning to voice criticism against him. In the democratic society, criticism plays a very important role. Relying on the critical opinion of the public who continue to voice steadily, we may be able to continue the prosecution of

President Bush.

In May 1967, the International War Crimes Tribunal founded by Bertrand Russell passed the judgment that the U S government is guilty of the crime of aggression into Vietnam. Courage of Russell and his contemporaries commands our admiration as the forerunner of the citizen's tribunal movement like this one. At the same time, it should be noted that the judgment ruled that the Japanese government was also guilty of crime of aggression in its complicity with the U.S. (Unanimous about the U.S. guilt and 8 to 3 about the guilt of Japan in complicity).

Judgment of the Russell court says,

> "The U.S. Forces have the right to use all the territories of Japan from the military bases of the U.S. Army, Navy and Air Force located in Okinawa."

By making use of Japan's highly developed technology and abundant supply of materials for the repair of the U.S. warships, commercial vessels and aircrafts as well as procurement of all the equipments, the U.S. government put Japan in complicity, an important element that constitutes the U.S. strategy in the Vietnam War. ("Conclusion of International War Crimes Tribunal about War Crimes in Vietnam" from Documents about the Vietnam War edited by Saburo Rikui, Kinokuniya, 1969.)

The Prosecutor did not file the indictment concerning the Japanese Prime Minister in the Afghan court this time. Therefore, it would be outside the jurisdiction of this court to pursue the responsibility of the Japanese government for prosecution.

However, my reference to the Japanese government's responsibility would be meaningful to the future of Japan in view of the present position of the government that it is willing to revise the Article 9 of the Constitution, setting the time limit.

The Constitution not only renounces war as a sovereign right of the nation and the threat or use of force as means of settling international disputes forever in Article 9, but also its preamble declares its determination to preserve security and existence, trusting in the justice and faith of the peace-loving peoples of the world even if it is faced with a hostile country with threat. This is also applicable to non-governmental terror organizations. Japan should pursue solidarity with peaceful powers of the world including Islamic countries through all channels and network.

Nevertheless, Prime Minister Koizumi and his administration hurriedly enacted the "anti-terrorism law" in violation of the constitution, and have offered "logistic support" to the U.S. Forces in the war with Afghanistan ordered by President Bush. Koizumi has kept on moving in that direction until ground troops of the Japanese Self-Defense Forces were deployed in the Iraqi War starting in March of 2003. Efforts to amend the text of Article 9 of the constitution are also progressing steadily. We may call it the steps to an ordinary country, which uses the armed force ordinarily.

Yet, by choosing "peace without military power", Article 9 of the Constitution of Japan aspires to realize global peace. (Ref. "Peace without military power -- creative power of the Japanese Constitution" by Asaho Mizushima, Iwanami, 1997). In that context, Article 9 of the Constitution of Japan is not merely an article of the constitution of one country or its people, but also the public properties of the world citizens who struggles for peace.

For example, the first clause of the fundamental ten principles for a just world order adopted

at the Hague Appeal for Peace on May 15, 1999 says, “1. Every Parliament should adopt a resolution prohibiting their government from going to war, like the Japanese article number nine.”

The opinion of the court passes the judgment on President Bush in his crimes related to the Afghanistan War. It also will serve as a milestone to the age-old struggle for realization of peace by the rule of law for “this and future generations” (Article 97 of the Constitution), encouraging people of the world to rely on peace power.