How to Conduct Lawfare against Nuclear Weapons More Effectively in Japan

－A View from the Law of Armed Conflict－*

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Abstract

For more than 75 years, anti-nuclear-weapons movements in Japan have been asserting the illegality of the use of nuclear weapons. These assertions, however, can sometimes be described as generalist or even stereotypical. In fact, they rely mainly on the principle of humanity which could be interpreted in many ways. For this reason, legal experts among the Japanese Government have refuted them relatively easily. Nonetheless, there are other technical but equally important issues that could serve as a basis for more convincing legal arguments. Using the law of armed conflict as an analytical lens, this paper examines these issues, such as the applicability of the Additional Protocol I to the Geneva Conventions and the Statute of the International Criminal Court to the use of nuclear weapons, and the legal validity of nuclear belligerent reprisals. By analyzing these legal considerations, this paper explores more effective ways for conducting legal warfare against the use of nuclear weapons.

Keywords: Law of Armed Conflict, Nuclear Weapons, Additional Protocol I to the Geneva Conventions, Rome Statute of the International Criminal Court, Extended Nuclear Deterrence

* This paper is dedicated to my longtime friend and colleague, the late Professor Mitsuo Matsumoto.

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1. Introduction

1.1: Importance of Legally Technical Issues

Nuclear attacks against two Japanese cities by the US Army Air Force in 1945 resulted in an unparalleled scale of human suffering. Remembering this tragedy, anti-nuclear-weapons movements in Japan have naturally and consistently asserted that the use of nuclear weapons is illegal in any circumstance.[1]

However, their assertions concerning the legality of using nuclear weapons can sometimes be described as generalist or stereotypical, as they have mainly relied on the principle of humanity.[2] While this principle undoubtedly lies at the core of international law, it emerges in various forms[3] and leaves room for different interpretations. Due to its inherent vagueness or all-inclusive nature, it is difficult to determine the legality of the use of a specific weapon by merely adopting this principle. Furthermore, considering the lack of coherent State practices and consensus among academics on the legality of the use of nuclear weapons, these kinds of generalist or stereotypical views are not persuasive.

It should be mentioned here that the Japanese Government has always tried to maintain the delicate balance between the Three-Non-Nuclear Principle[4] supported by the overwhelming majority of Japanese people and the strategic necessity of improving the credibility of extended nuclear deterrence based on the 1960 Japan-US Mutual Security Treaty. For this reason, the Japanese Government's view of the legality of the use of nuclear weapons is inevitably equivocal,[5] which contradicts those of non-nuclear NATO members that are similarly placed under the nuclear umbrella. However, adhering to generalist arguments, anti-nuclear-weapons movements in Japan have overlooked the significance of legally technical issues hidden behind such equivocal views of the Japanese Government.

1.2: Legal Issues of Particular Relevance to Anti-Nuclear-Weapons Movements in Japan

From the point of legal warfare or lawfare,[6] in addition to emphasizing the importance of the principle of

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[1] Many non-governmental movements actively pursuing world peace emerged in Japan after its defeat in World War II. Although they have different backgrounds and political beliefs, most of them seek a total ban on nuclear weapons. *See generally*, Yoshie Kobayashi, "Nihon ni okeru Hankaku-Undou ni taisuru Ichi-Kousatsu" [Anti-Nuclear Movement and Legacy of the Cold War], *Gunma Kenritsu Jyoshidaigaku Kiyou* [*Bulletin of Gunma Prefectural Women's University*], No.34, 2013, pp.113-123.

[2] For detailed studies on this point, *see*, Kazumi Mizumoto, "Kakuheiki no Hijindousei to Sensou no Hijindousei" [Inhumanity of the Nuclear Weapon and Inhumanity of War], *Jindou Kenkyu Journal* [*Journal of Humanitarian Studies*], Vol.5, 2016, pp.32-47; Akihiko Saito, "Hibaku Nanajyunenme no Jindou-Rinen" [The Power of Humanity on the 70th Anniversary of A-Bombings], *ibid*., pp.48-62. Judging from the statements and publications of anti-nuclear-weapons movements in Japan, these movements did not give special attention to international legal issues until recently. Even a comprehensive survey project on anti-nuclear movements from 1945 to the 1960's in Hiroshima by a research institution for nuclear abolition did not cover legal issues besides lawsuits brought to Japanese courts by Hibakushas. Hiroshima Peace Institute, "A Comprehensive Historical Analysis of Anti-Nuclear and Peace Movements in Hiroshima," https://www.peace.hiroshima-cu.ac.jp/archive/2007-02/.

[3] *E.g.,* Martens Clause, Preamble of the Hague Convention IV Respecting the Laws and Customs of War on Land. The International Court of Justice (ICJ) also referred to this principle. *The Corfu Channel Case* (Merits), *ICJ Reports 1949*, p.22; *Military and Paramilitary Activities in and against Nicaragua*(Merits), *ICJ Reports 1986* (*hereinafter Nicaragua Case*), para.215; *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, ICJ Reports 1996* (*hereinafter Legality of Nuclear Weapons*), para.79.

[4] In 1967, the then Prime Minister Eiichi Sato stated at the Japanese Diet the Three-Non-Nuclear Principle of not possessing, not producing, and not permitting the introduction of nuclear weapons. *Dai 57-Kai Kokkai Shugiin Yosan-Innkaigiroku* [*Minutes of the Budget Committee on the 57th Session of the Diet, the House of Representative*], No.2, 11 Dec. 1967, p.8. It should be noted that this principle is neither provided for in the Constitution of Japan nor incorporated into its national legislation.

[5] The most typical example is a written statement of the Japanese Government submitted to the ICJ during its process of an Advisory Opinion on nuclear weapons. It stated, "because of their immense power to cause destruction, the death of and injury to human beings, the use of nuclear weapons is certainly contrary to the *spirit* of humanity that gives international law its *philosophical* foundation" (emphasis added). Letter dated 14 June 1995 from the Minister at the Embassy of Japan, together with the Written Statement of the Government of Japan, https://www.icj-cij.org/public/files/ case-related/95/8670.pdf.

[6] In this paper, the term "lawfare" merely refers to various attempts to use laws including the LOAC to persuade an opponent, which is a broader definition than that originally envisaged by General Dunlap. Charles J. Dunlap, Jr., "Lawfare Today: A Perspective," *Yale Journal of International Affairs*, Vol.3, Issue 1, 2008, pp.146-154.

humanity continuously, it is necessary to raise legally technical questions that could serve as a basis for convincing arguments. For this purpose, this paper will focus on the law of armed conflict (LOAC) also known as international humanitarian law (IHL)[7] and examine the following three issues.

The applicability of the 1977 Additional Protocol I to the Geneva Conventions of 1949 (API) to the use of nuclear weapons must be revisited first. The API could considerably reduce the scope of the legally permissible use of nuclear weapons, and thus, France, the UK, the US, and some non-nuclear NATO members have persistently denied its applicability to the use of nuclear weapons by making declarations.[8] Curiously, the Japanese Government has kept silent on this issue and has not raised any objection. This issue is not a bygone one, and it is still necessary to examine the legal meaning of the Japanese Government's silence on this issue.

A similar issue arose when France and the UK declared, on their ratifying the Statute of the International Criminal Court (ICC) of 1998, that its provisions on war crimes related solely to conventional weapons.[9] The Japanese Government did not object to these declarations either, although they were apparently beyond the normal limit of the literal interpretation of the Statute. Thus, this paper examines the legal meaning of this silence as well.

The third and more fundamental issue is the legal validity of an extended nuclear deterrence strategy. Needless to say, nuclear deterrence relies mainly on the legality of belligerent reprisals. However, even if the customary LOAC admits belligerent reprisals by a State that is directly victimized, it is not clear whether a co-belligerent State not a victim of illegal attacks is also entitled to belligerent reprisals to protect its ally. If we deny the legality of these so-called collective belligerent reprisals, then, in-so-far as a countervalue nuclear attack is concerned, the strategy of extended nuclear deterrence no longer has a legal ground to stand on. This third issue is of key relevance for Japan and other non-nuclear States that are a part of a mutual defense mechanism. This paper begins by providing some background on the LOAC before exploring each of these three issues in turn.

2. International Law, the Law of Armed Conflict, and Nuclear Weapons

2.1: International Law Regulating the Use of Armed Force — *Jus ad Bellum* and *Jus in Bello*

International law divides rules relating to war, the use of force, or armed conflict into two parts: *jus ad bellum* and *jus in bello*. Both consist of customary and conventional rules. *Jus ab bellum* refers to conditions under which States may resort to the use of force. The pillars of the current *jus ad bellum* include Articles 2, para.4 (non-use of force principle), and 51 (right of self-defense) of the UN Charter. *Jus in bello* is a group of rules that regulate the actual conducts of parties in armed conflict－in this sense, it is synonymous with the LOAC or IHL. The most important components of *jus in bello* today are the Regulations Annexed to the 1907 Hague Convention IV on Land Warfare, the four 1949 Geneva Conventions (GCs), and the two 1977 Additional Protocols to the GCs.[10]

Jus ad bellum and *jus in bello* are applied independently. Therefore, when examining the legality of using a particular weapon, four distinct scenarios emerge: those in which the use of that weapon is (1) legal according to both groups of law, (2) legal according to *jus ad bellum* but illegal according to *jus in bello,* (3) illegal according

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[7] Even academics majoring in international law in Japan have been more interested in disarmament law. A notable exception was the late Professor Hisakazu Fujita, who wrote many books and articles on the LOAC (he preferred to use the term IHL) including *International Regulation of the Use of Nuclear Weapons*, Kansai Univ. Pr., 1988.

[8] *See*, *infra* 3.1.

[9] *See*, *infra* 3.2.

[10] In addition to the API applicable to international armed conflict (IAC), the Additional Protocol II (APII) to the GCs for regulating non-international armed conflict (NIAC) was adopted in 1977.

to *jus ad bellum* but legal according to *jus in bello,* and (4) illegal according to both. However, if a specific use of force in itself is against *jus ad bellum*, the use of any weapon in such a situation, irrespective of their types, is also illegal from the point of *jus ad bellum*. In short, examination of the legality of the use of a particular weapon can only be meaningful within the field of *jus in bell*o or the LOAC.[11]

An important outcome of such a dual-track-application system is that even a State violating *jus ad bellum* cannot be despoiled of its rights under *jus in bello*. This means that the rights and duties of the aggressor and victim States are identical under *jus in bello*. Therefore, even States that are victims of war of aggression, which is the most serious violation of *jus ad bellum*, are not entitled to the violation of *jus in bello* in responding to violations of *jus ad bellum.*[12]

2.2: Sub-Categories of the LOAC — The Laws of Geneva and The Hague

The LOAC rules are often divided into two parts: the Law of Geneva and the Law of The Hague.[13] The former consists of rules for the protection of the victims of war[14] and civilian objects. The latter is a term referring to a group of rules regulating the methods and means of warfare.[15] Although the dichotomy between these two laws seems to lose its relevance with the adoption of the API codifying and developing both laws, it should be noted that the underlying tenet of these two laws is not the same. Of the two laws, the Law of The Hague is most closely related to the use of weapons. It requires that attacks should only be directed against legitimate targets and demands that causing superfluous injury or unnecessary suffering to combatants must be avoided.[16]

Thus, if a weapon can be used properly within these limitations, that weapon would not be regarded as a prohibited weapon or prohibited means of warfare *per se*. In this case, care must be taken only regarding the methods of using it. On the contrary, a weapon causing indiscriminate effect, or superfluous injury or unnecessary suffering whenever it is used should be treated as a prohibited weapon or prohibited means of warfare.[17] Biological and chemical weapons are typical examples of prohibited weapons. However, it is not always easy to determine to which category a particular weapon belongs.

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[11] Since the UN Charter completed the outlawry of war and ended the era of peace and war dichotomy, the LOAC is no longer the only body of international law rules governing conducts during armed conflict. There are several other areas of international law concurrently applied to armed conflict situations such as the laws of human rights and the environment. Nonetheless, the LOAC has remained the main source of rules regulating hostilities during armed conflict.

[12] However, this principle of equal application of *jus in bello* faced challenges. There were arguments that for the very survival of a society, it was allowed to act in a manner contrary to *jus in bello*. Hersch Lauterpacht ed., *Oppenheim's International Law*, Vol.2, 7th ed., Longmans, 1952, p.351. The ICJ referred to an extreme-circumstance of self-defense. *Legality of Nuclear Weapons, supra* note 3, para.105, (2)E. *See also*, Brian Drummond, "UK Nuclear Deterrence Policy: An Unlawful Threat of Force," *Journal of the Use of Force and International Law*, Vol.6, Issue 2, 2019, pp.216-217.

[13] These terms are derived from the names of the cities where the respective conventions were adopted. There is another way to classify the LOAC by adopting geographical criteria. Rules relating to the destruction of targets and protection of certain persons and objects on the ground are called the law of ground warfare. Those rules at sea and in the air are called the law of naval warfare and the law of aerial warfare respectively. Basic principles and rules of the Laws of Geneva and The Hague are common in these laws except for the treatment of objects other than the targets of attack.

[14] War victims are divided into four categories: the wounded and sick in armed forces in the field; the wounded, sick, and shipwrecked members of armed forces at sea; prisoners of war; civilians.

[15] It also includes the law of neutrality governing interrelationship between parties and non-parties to an IAC.

[16] This principle is not applicable to civilians because they cannot become legitimate targets and it is prohibited to cause any injury or suffering to them, except for the ones that occur incidentally.

[17] Methods of warfare refer to the ways in which weapons are used. Means of warfare can be considered synonymous with weapons. Yves Sandoz et al. eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August*, International Committee of the Red Cross (ICRC)/Martinus Nijhoff, 1987 (*hereinafter ICRC APs Commentary*), para.1402. Rules on the methods and means of warfare are generally applied to IAC, such as inter-State armed conflicts, and not to NIAC, including civil wars, unless there exists a recognition of belligerency or a convention explicitly stipulates otherwise.

2.3: Cardinal Principles of the Methods and Means of Warfare — The Issue of Illegal Weapons *per se*

For some years since 1945, there has been an argument that the LOAC is not applicable to innovative unconventional weapons such as nuclear weapons invented after the formulation of existing customary and conventional rules. In fact, the Japanese Government invoked this argument during the 1963 *Shimoda* Case at the Tokyo District Court,[18] in which the legality of the nuclear attacks against Japan was disputed. Interestingly, a similar argument was made in the early 2000's when the issue of the legality of non-kinetic cyber means of warfare was raised. However, such arguments have not been supported by State practices or academic writings.[19]

The LOAC has been flexibly coping with technological and tactical developments, leaving no legal lacuna. In fact, the Tokyo District Court found in its judgement of 1963 that the nuclear attacks against Japan were in violation of existing rules of the LOAC. The Court properly held that these attacks were illegal because they indiscriminately killed and destroyed protected persons and objects, as well as caused superfluous injury and unnecessary sufferings to the combatants present there.[20] However, needless to say, the findings of a judicial decision cannot be generalized. They only tell us that the use of a nuclear bomb with a yield of around 20kt against a medium-sized city violates the LOAC, unless circumstances extenuating its illegality, such as belligerent reprisals, exist.

The key issue here is whether nuclear weapons cannot be used without violating either of the two cardinal principles regulating the methods and means of warfare: the principle of distinction and that of the prohibition of causing superfluous injury or unnecessary suffering to combatants.

Regarding the indiscriminate nature of nuclear weapons, we can assume that nuclear weapons' effects are largely indiscriminate. This observation is correct when thinking about countervalue attacks. However, interlocutors might suggest that there are some hypothetical cases where nuclear weapons could be used properly following the principle of distinction, such as scenarios of nuclear attacks against submarines on the open sea or armored troops in the desert. Destroying them is by no means against the LOAC. Moreover, such attacks might not cause excessive collateral damage to civilians or civilian objects due to isolated target locations.[21] This means that such attacks are not against the principle of proportionality, a corollary to that of distinction. The use of bunker-buster nukes against hardened underground command posts could be another example.[22]

Furthermore, it might be suggested that, even when nuclear attacks result in considerable collateral damage, such damage might not be considered excessive to the huge military advantage anticipated by the use of nuclear weapons. If allowed to count in broader or strategic advantages, such as those of accelerating the end of war with minimum friendly casualties, the prospects of severe enemy civilian losses, no matter how high, could be proportionate to this huge military advantage. As the concept of military advantage usually concerns contextual

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[18] This has been the only contentious case brought to a court in the world. Shimoda and other victims of nuclear attacks of 1945 sought compensation from the Japanese Government, as the Government had renounced its right to claim for damages from the US. Judgement, Tokyo District Court, 7 Dec. 1963, *Hanrei-Jihou*, No.355, 1964 (*hereinafter Shimoda Case*), pp.17ff.; *Japanese Annual of International Law,* No.8, 1964, pp.231ff.

[19] The ICJ reconfirmed the validity of existing rules to newly invented weapons. *Legality of Nuclear Weapons*, *supra* note 3, para.105, (2)E.

[20] *Shimoda Case*, *supra* note 18 (*Hanrei-Jihou*), pp.26-29.

[21] Wherever a nuclear weapon detonates, damage caused to the natural environment would be great. However, the LOAC does not accord the natural environment the same protection that it gives civilian objects. Indeed, Article 55, para.1, of the API does not prohibit the use of methods and means of warfare that cause incidental environmental damage, unless such damage is widespread, long-term, and severe, and thereby prejudices the health or survival of the population. *See also*, Article 35, para.3. Furthermore, the proportionality test was not introduced to environmental damage until the adoption of the ICC Statute (Article 8, para.2(b)(iv)). As such, the LOAC has an anthropocentric character (ironically, the term IHL created in the early 1970's by the ICRC to emphasize the humanitarian aspects of *jus in bello* has a more anthropocentric connotation.).

[22] High-altitude nuclear explosion for jamming enemy command and control systems by electromagnetic pulse (EMP) could also be an example, unless widespread non-kinetic damage to civilian systems concurrently occurred are counted in as collateral damage.

tactical advantage rather than a strategic one in abstract terms,[23] such an argument should be rebutted. Nonetheless, it must be pointed out that a fundamentally important problem remains: disproportionate or excessive compared to what?[24]

In comparison to this, it seems somewhat easier to indicate that each use of nuclear weapons is likely to cause superfluous injury or unnecessary suffering to combatants. Although the blast and heat damages by nuclear explosion are tremendous, these effects are not necessarily unique to nuclear weapons, and thus, they are not considered prohibited weapons for merely bringing about these effects. However, radioactive discharge is a special characteristic of nuclear weapons, and surviving combatants would suffer radiation injuries. The *Shimoda* Judgement persuasively held that radiation injuries caused by nuclear attacks are superfluous and unnecessary because they are greater than those caused by biological and chemical weapons, which are outlawed due to their inhumane effects.[25] Thus, given that victims of nuclear weapons, including low-yield tactical ones, face long-lasting effects of radiation as a matter of course, nuclear weapons could be prohibited *per se*.

Here again, one may raise a fundamentally important question: superfluous and unnecessary to what? As indicated by the 1868 St. Petersburg Declaration, it is interpreted that superfluous injury and unnecessary suffering are those that are greater than what is necessary to put a combatant *hors de combat*. However, if allowed to take into account broader military necessity, the scope of superfluous and unnecessary damage would diminish significantly. Similar to the argument made in relation to the principle of proportionality, the necessity to achieve the military aim with minimum casualties of friendly forces could be invoked to offset the inhumane effects on enemy combatants.[26]

An overview shows that we cannot dismiss the possibility of the legal use of nuclear weapons out of hand. Indeed, the practices and opinions of States are not unanimous on this point. Even the 1996 Advisory Opinion of the ICJ deliberately avoided stating that the use of nuclear weapons is apparently illegal in any circumstances.[27] As such, it still seems difficult to declare that a customary rule dictating that nuclear weapons are prohibited means of warfare has already been formulated. Therefore, the nuke's legality should be judged according to the customary and conventional rules on the methods of warfare, meaning that their legality is largely circumstantial, as in case of the legal conventional weapons.

2.4: The Treaty on the Prohibition of Nuclear Weapons — Its Relevance or Irrelevance

The Treaty on the Prohibition of Nuclear Weapons (TPNW) adopted in 2017 is the world's first treaty that explicitly bans the use of nuclear weapons in its Article 1, para.1(d), without any geographical limitation.[28] In this sense, it has a provision pertaining to the LOAC, more specifically, that of the means of warfare. Before discussing the three LOAC-related issues that are of particular relevance to anti-nuclear-weapons movements in

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[23] *ICRC APs Commentary*, *supra* note 17, paras.2204-2219.

[24] When Judge Schwebel analyzed the legality of the use of a nuclear depth-charge against an enemy submarine that was about to launch nuclear missiles to civilian-populated cities, he took the number of civilians who evaded a nuclear blow into account as an instance of military advantage. Dissenting Opinion of Vice-President Schwebel, *Legality of Nuclear Weapons*, *supra* note 3, pp.320-322.

[25] *Shimoda Case, supra* note 18 (*Hanrei-Jihou*), p.29.

[26] The burden of proof regarding excessive collateral damage lies with the attacking belligerent. This is reconfirmed especially by Article 57 of the API. However, due to the ambiguity of the criteria for measuring excessiveness, belligerent States launching attacks can easily argue that the collateral damage that their attacks have incurred is not excessive. The same can be said with regard to the burden of proof in the context of superfluous injury and unnecessary suffering.

[27] *Legality of Nuclear Weapons*, *supra* note 3, para.105, (2)(E).

[28] It is also interpreted that Article 1 prohibits belligerent reprisals by nuclear weapons. Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*, Oxford Univ. Pr., 2019, pp.135, 153. The issue of nuclear belligerent reprisals will be discussed later in this paper. *See*, *infra* 4.1.

the next chapter, this section examines whether any advancement was made by the TPNW for getting out of the legal stalemate mentioned above.

Undoubtedly, the entry of the treaty into force in 2021 has historical importance, and it has become a symbol of victory for humanity. However, a solution by adopting a treaty entails an inherent defect. While any treaty can be properly made as long as consent is achieved and can enter into force unless it is against *jus cogens*, a treaty does not have any binding power *vis-à-vis* its non-parties. This defect could be remedied only when every State becomes its contracting party, or when a treaty in whole or part obtains a customary law nature. Because it is not imaginable that all States will become party to the TPNW, it will not be universally binding on a consensual basis. The focus is necessarily on its customary law nature.

To determine whether the TPNW has codified existing customary rules as far as its provision on the means of warfare is concerned, it is necessary to analyze the States' practices and legal opinions, which have already been overviewed in the foregoing sections of this paper. The answer seems to be negative, and this is the very reason why the anti-nuclear-weapons movements across the world tried to establish new rules by means of treaties.

Of course, it is still possible that the TPNW could attain the status of customary rule at some point, if the conditions for formulating customary rules are fulfilled. However, it will be difficult to find general practices and *opinion juris* that render no-use practices obligatory. As in the past three-quarters of a century, no-use practices hereafter would not be in themselves considered an indication of the existence of a prohibitive customary rule. In addition, any quasi-unanimous legal belief will not be seen in the foreseeable future among States, especially given that France, India, the UK, and the US stated that they would not accept any claim that the TPNW contributes in any way to the development of customary international law.[29] Because a prohibitive rule embodied in Article 1, para.1(d), is not likely to crystallize into customary law,[30] there is no urgent need for nuclear-weapon States to invoke the concept of persistent objectors in order to evade a prohibitive customary rule.[31] Thus, the TPNW does not help us overcome the stalemate brought on by the current LOAC.

3. Arguments against Applying the Additional Protocol I and the ICC Statute to the Use of Nuclear Weapons

3.1: The Additional Protocol I

Every effort to find or establish a universal rule of the LOAC dictating that nuclear weapons are inherently illegal means of warfare has not succeeded so far. Consequently, to tame nuclear weapons by the LOAC, there is no other way but to rely on the rules regulating the methods of warfare that are applicable irrespective of weapon categories. It should be recalled again that two cardinal customary law principles of the LOAC, namely, the principle of distinction and that of prohibition of causing superfluous injury and unnecessary sufferings to

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[29] *Ibid.,* p.53.

[30] One might consider that the more States become party to the TPNW, the more firmly its customary law nature is secured. However, even when all of the States except for nuclear-weapon States accept the TPNW, it would be difficult to say that the TPNW is crystalized as customary law. As Baxter explained, practices and a sense of legal duty among parties to a treaty are usually shown in relation to that particular treaty. Therefore, it is inappropriate to treat these as general practice and *opinion juris*, unless parties explain their compliance in terms of customary law. Richard Baxter, "Treaties and Custom," *Recueil des Cours*, Tome 129 (1970-I), pp.64, 73; Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law," *American Journal of International Law*, Vol.90, No.2, 1996, p.247. *Cf., Nicaragua Case*, *supra* note 3, paras.187-190.

[31] For persistent objector status in the context of the TPNW, *see*, Casey-Maslen, *supra* note 28, p.56. For more on whether the LOAC admits the persistent objector, *see,* Patrick Dumberry, "Incoherent and Ineffective: The Concept of Persistent Objector Revisited," *International and Comparative Law Quarterly*, Vol.59, Issue 3, 2010, pp.792-793.

combatants, could render most nuclear attacks illegal.

These customary law principles have been codified by several treaties, most notably by the API. This treaty adopted in 1977 is a significant outcome of the process of reaffirmation and development of *international humanitarian law* led by the ICRC. It is the first treaty that contains various provisions to protect civilians and civilian objects from attacks in its Part IV, Section I, titled "General Protection against Effects of Hostilities" (Articles 48-67). It includes provisions on the methods and means of warfare in order to ensure avoiding damages caused to these protected persons and objects in and around target areas. In this sense, the API straddles both the Laws of Geneva and The Hague. Although some regional or global military powers, such as India, Iran, Israel, Pakistan, and the US are not among its parties, they are bound by its Articles having customary law nature.[32]

The API does not just codify and clarify customary rules. It also contributes to the development of the LOAC as shown in its Preamble. It introduces important new rules and criteria regarding the methods of warfare and adopts somewhat restrictive wording.[33] These new rules could further diminish the legally permissible scope of the use of nuclear weapons. Thus, it is remarkable that five nuclear-weapon States, that is, the People's Republic of China (PRC), the Democratic People's Republic of Korea (DPRK), Russia, the UK, and France, became its parties.[34] However, as is well known, the UK, France, and some non-nuclear NATO members have maintained that the provisions of the API do not apply to the use of nuclear weapons. The UK made a declaration in 1998 stating that the newly introduced provisions of the API were intended to apply exclusively to conventional weapons. In 2001, France also declared that the API exclusively concerns conventional weapons.[35]

If interpreted in accordance with the ordinary meaning of its terms, the API can be applied regardless of the type of weapon used, unless the context as referred to in Article 31, para.2, of the Vienna Convention on the Law of Treaties (VCLT) indicates otherwise. Actually, there was no substantial debate on this issue during the process of drafting.[36] Although it was pointed out that even the ICRC did not intend to address nuclear weapons in the API,[37] it seems difficult to state categorically that there was a consensus during the drafting process of the API that it applied exclusively to conventional weapons.[38] Rather, it might be more appropriate to say that the declarations made by some NATO members constitute reservations or conditional interpretative declarations that are treated like reservations.[39] If so, the issue would be whether their declarations are compatible with the purpose

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[32] Currently, even the US is of the view that all nuclear operations must be consistent with the fundamental principles of the LOAC. US Department of Defense, *Law of War Manual*, 2016, pp.416-417.

[33] The followings are examples of newly introduced provisions on the methods of warfare: Articles 51 (para. 6); 52 (para. 1(prohibition of belligerent reprisals against civilian objects)); 53 ((b), (c)); 54; 55.

[34] The years of ratification or accession of nuclear-weapon States are as follows: the PRC (1983); the DPRK (1988); Russia (1989); the UK (1998); France (2001). As for the other parties in the Far East: the Republic of Korea (1982); Mongolia (1995); Japan (2004).

[35] The UK and the US made on their signing in 1977 virtually identical declarations stating that the new rules introduced by the API are not intended to have any effect on the use of nuclear weapons. Adam Roberts et al., eds., *Documents on the Laws of War*, 3rd ed., Oxford Univ. Pr., 2000, pp.510-512. Eight NATO members, namely, Belgium, Canada, France, Germany, Italy, the Netherlands, Spain, and the UK, did so when they ratified or acceded to it (of these States, Belgium, Germany, Italy, and the Netherlands participate in a nuclear sharing arrangement with the US.). The UK's declaration at the time of its ratification in 1998 confirmed that the new rules introduced by the API apply exclusively to conventional weapons. Other States issued similar declarations, although the French declaration in 2001 deemed to be interpreted that the API as a whole exclusively concerns conventional weapons. Ireland formulated in 1999 a declaration linked only to Articles 35 and 55. None of these States categorized their statements as reservations. ICRC Database, at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStates Parties&xp_Treaty Selected=470.

[36] Julie Gaudreau, "The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims," *International Review of the Red Cross*, No.849, 2003, p.12.

[37] *E.g.*, Henri Meyrowitz, "La stratégie nucléaire et le protocole additional aux Conventions de Genève de 1949," *Revue Générale de Droit International Public*, Tome 83, No.4, 1979, pp.911-932 ; *idem*., "Le statut des armes nucléaires en droit international, 1e part," *German Yearbook of International Law*, Vol.25, 1982, pp.227-237.

[38] *E.g.*, Hisakazu Fujita, *Kakuheiki ni Tachi-Mukau Kokusaihou* [*International Law Confronting Nuclear Weapons*], Houritsu-Bunka-Sha, 2011, pp.103-104.

[39] International Law Commission (ILC), "Guide to Practices on Reservations to Treaties," *Yearbook of the International Law Commission*, 2011, Vol.2, Pt.3 (*hereinafter* Guide to Practices), para.1.4.2.

and aim of the API.[40]

This paper will now turn to its main issue－how to conduct lawfare against nuclear weapons more effectively in Japan. Although these nuclear-weapon-exemption declarations were communicated to all API parties and other States entitled to be its parties,[41] Japan did not table any objection either when these declarations were made or when it acceded to the API in 2004. What does this silence mean? Theoretically, there are three possibilities: first, Japan accepted these States' views as the only permissible interpretation of the API; second, Japan thought that these declarations were simple interpretative declarations not attempting to modify treaty obligations; third, Japan considered their declarations to be reservations.

It is unlikely that the UK or France will launch nuclear attacks on Japan, and thus, their declarations have no practical consequences for Japan. Nonetheless, this applicability issue is critically important for Japan when thinking about a hypothetical nuclear attack by one of the three nuclear- weapon States in the Far East, especially the DPRK, all of which became parties to the API much earlier than Japan without attaching any declaration relating to nuclear weapons.

Assuming that Japan took the first position mentioned above, it could not assert that the API apply to nuclear attacks against it. Perhaps, the result would be the same if it took the second position. A State may formulate a simple interpretative declaration at any time, and even if Japan raises objections, it may be argued in return that Japan has not done so against the UK and France since they made such declarations.[42] While these two positions align with the views of the UK, France, and the US, the result would be that civilians and civilian objects in Japan would lose the more favorable protection given by the API.[43] If Japan took either of these two positions, one may ask the reason why it considers that these nuclear-weapon-exemption statements are not contrary to the plain meaning of the API's wording.

What would happen if Japan took the third position? As mentioned above, Japan has not made any objections to these declarations so far. To keep silent for a certain period may indicate that it recognizes the compatibility of these reservations according to Article 20, para.5, of the VCLT. In fact, no statements or documents indicating otherwise have been found. Of course, even if Japan accepted the compatibility of the reservations, the API would be applicable to hypothetical nuclear attacks against Japan by nuclear-weapon States in the Far East,[44] because these States did not make such reservations at the time of accession. Unlike the case of interpretative declaration, they might not have any further chance to make reservations after their accession to the API. However, in any event, the Japanese Government would be asked why it thought that NATO members' nuclear-weapon-exempt reservations were compatible and why it had not formulated any objections.[45]

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[40] *See*, Michael Bothe et al., "Die Genfer Konferenz über humanitäres Völkerrecht: Velauf und Ergebnisse," *Zeitschrift für Ausländisches Öffentliches und Völkerrecht*, Band 38, 1978, ss.43-44. If the applicability of the API was excluded from the beginning as Meyrowitz observed, these declarations would merely confirm the only permissible interpretation of the API.

[41] It is legally required to do so in the case of reservations. VCLT, Article 23, para.1.

[42] Recalling that the DPRK has long been under American nuclear threat, it is natural that it has not made any nuclear-weapon-exemption declaration. However, currently, it has nuclear missiles. One may wonder whether the DPRK would be permitted to adopt this interpretation at a convenient time, for instance, immediately preceding a nuclear attack against Japan. Generally speaking, a simple interpretative declaration may be made at any time. Guide to Practices, *supra* note 39, para.2.4.4.

[43] The same can be said with regard to the DPRK's civilians and civilian objects. However, in any event, the US is not bound by the API.

[44] While Japan has not explicitly granted *de jure* recognition of State to the DPRK, treaties such as the API are considered applicable in its relations with the latter. For a recent judgement of the Supreme Court of Japan on its treaty relationship with the DPRK, *see*, *Korean Film Export and Import et al. v. Fuji TV Network,* Judgement, 8 Dec. 2011, *Japanese Yearbook of International Law*, Vol.56, 2013, pp.399-401.

[45] ILC's Guide to Practices stipulates that an objection to a reservation formulated after the end of the period specified in the VCLT, Article 20, para.5, does not produce all the legal effects of an objection formulated within that period. However, it quoted several precedents in which objections were formulated late, including that by Japan. Guide to Practices, Commentary on para.2.6.13, *supra* note 39, p.168. Regarding the nuclear-exemption-declarations, Japan did not formulate any objections, late or otherwise.

It would not be politically easy for the Japanese Government to adopt one of these three positions, as all of them presuppose the validity of the nuclear-weapon-exemption declaration. Nonetheless, given that Japan is the only country to have suffered a nuclear attack, its Government should be held accountable for what it did or did not do in the context of the API, which is the most important and comprehensive LOAC treaty today.

As for the API, there is another important issue: the compatibility of NATO members' reservations with the API's provisions prohibiting belligerent reprisals, which is closely related to the legality of nuclear second strike. This issue will be discussed further in Chapter 4 when dealing with extended nuclear deterrence.

3.2: The ICC Statute

When France ratified the ICC Statute in 2000, it declared that the Statute does not apply to the use of nuclear weapons.[46] Even if a State using nuclear weapons is not a contracting party to the ICC Statute, the ICC could exercise its jurisdiction on this nuclear attack provided that the victim State is a party to the Statute.[47] However, if the French declaration is admissible, then the use of nuclear weapons by the French Armed Forces would not fall within the ICC jurisdiction. In addition, the UK took the same position in its declaration, albeit implicitly.[48]

When the Statute was being drafted, States participating in negotiation debated whether the use of nuclear weapons *per se* should be regarded as a war crime in the context of the Statute. Efforts to criminalize the use of nuclear weapons explicitly finally failed and, instead, the Statute included sub-para.(xx) to Article 8 (war crimes), para.2(b), which presents a mechanism for the future inclusion of the use of a specific weapon into the list of war crimes. Thus, the ICC Statute does not explicitly condemn the use of nuclear weapons as a means of warfare. However, its provisions pertaining to war crimes by adopting certain methods of warfare are applicable irrespective of the type of weapons used.[49] During its drafting process, there existed no consensus that these provisions are not applicable to the use of specific weapons, such as nuclear weapons. It is also difficult to find academic writings supporting such an exclusion. Hence, the French declaration should be considered a reservation. If this is the case, the declaration must be null and void, because the Statute provides that no reservations may be made. Unlike in the API situation, the compatibility test has no relevance with regard to the ICC Statute, and Japan's silence does not necessarily indicate its recognition of the validity of reservations that are inadmissible *ab initio*.

In fact, some parties to the Statute made it clear in their declarations that any attempt to limit the scope of Article 8 defining war crimes to events that involve conventional weapons only is inconsistent with the Statute.[50] Although these parties did not refer to the names of States making nuclear-weapon-exemption declarations, and hence, uncertainty regarding their legal effect is not completely dispelled, their declarations indicated that the French view was not widely supported. Furthermore, interestingly, no NATO members besides France and the

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[46] France categorized it as an interpretative declaration. It stated that Article 8 of the Statute, in particular para.2 (b) thereof, relate solely to conventional weapons, unless nuclear weapons become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of Articles 121 and 123. United Nations Treaty Collection (UNTC), at https://treaties.un.org/Pages/ViewDetails.aspx? src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#EndDec.

[47] ICC Statute, Article 12, para.2(a). If the nuclear-exemption declarations are valid, Article 12, para.(2), would not be applicable to any event involving nuclear weapons. In addition, on becoming a party to the ICC Statute, France also made a declaration following its Article 124.

[48] When ratifying the Statute in 2001, the UK declared that it confirmed and drew to the attention of the ICC its views as expressed, *inter alia*, in its statements made on the ratification of relevant instruments of international law including the API. UNTC, *supra* note 46.

[49] *I.e.*, relevant sub-paragraphs included in its Article 8, para.2(b), defining war crimes in the context of IAC that are not covered by grave breaches of the GCs.

[50] New Zealand and Sweden reconfirmed in connection with the deposit of their instruments of ratification that Article 8 of the Statute is applicable to events involving nuclear weapons. Egypt also made a similar declaration upon signature. *Ibid.*

UK made any nuclear-weapon-exemption declarations, although they did so in relation to the API and many sub-paragraphs of Article 8, para.2(b), of the ICC Statute originated in the API.

With respect to hypothetical nuclear attacks against Japan by one of the nuclear-weapon States in the Far East, although none of them has become party to the ICC Statute, these attacks could be within the jurisdiction of the ICC. As explained above, this is because the ICC can exercise its jurisdiction even when only a victim State in whose territory the conduct in question has occurred is its party, and Japan acceded to the Statute in 2007. Therefore, it is not necessarily critical for Japan to reconfirm the applicability of the Statute to the use of nuclear weapons. Nonetheless, considering the horizontal and vertical nuclear proliferation in the Far East, it is necessary to reconfirm the applicability of the Statute to nuclear attacks.

4. Belligerent Reprisals and Extended Nuclear Deterrence

4.1: Legality of Belligerent Reprisals

Belligerent reprisals can be defined as actions by a party of an IAC that would otherwise be illegal but are considered legal when taken in response to an enemy State's breach of the LOAC.[51] States are only permitted to resort to belligerent reprisals to terminate an enemy's breach of the LOAC.

Although belligerent reprisals are subject to stringent conditions, they are generally permitted unless prohibited by specific treaties. Indeed, belligerent reprisals have been long considered a core system for ensuring compliance with the LOAC, because the international community lacks a centralized system for enforcing international law and inevitably relies on a self-help mechanism. It seems difficult to prohibit a victimized belligerent State from resorting to belligerent reprisals without introducing an effective substitutional system.

However, efforts to outlaw belligerent reprisals persists.[52] The API is in line with these efforts and has expanded this prohibition significantly without establishing an effective substitute.[53] Most notably, Articles 51 and 52 of the API prohibit belligerent reprisals against enemy civilians and civilian objects located in their own States. In addition, there are judicial precedents of international criminal tribunals, such as the *Kupreskic* Judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY), which found that the prohibition of belligerent reprisals has become a customary rule.[54] In addition, although the TPNW does not expressly refer to belligerent reprisals, it is often interpreted as banning nuclear belligerent reprisals because it prohibits the use of nuclear weapons "under any circumstances."[55] Turning to international instruments other than the sphere of the LOAC, considerable attention is devoted to Article 50, para.1(c), of the Articles on the Responsibility of States which provides that countermeasures shall not affect the obligations of a humanitarian character prohibiting reprisals.

Nonetheless, it still seems premature to conclude that a prohibition on belligerent reprisals has already crystalized into customary law. This is mainly because, as we shall see, three Western nuclear-weapon States and major non-nuclear NATO members do not fully share this view.

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[51] Although the term "retaliation" is often used interchangeably with "reprisals," the former is in itself legal and must legally be distinguished from the latter.
[52] *See generally,* Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals," *Netherlands Yearbook of International Law*, Vol.20, 1989, pp.35-69.
[53] The International Fact-Finding Commission established by the API cannot be regarded as an effective substitutional system.
[54] *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Trial Chamber Judgement, ICTY, 14 Jan. 2000, paras.528-536.
[55] TPNW, Article1, para.1. Casey-Maslen, *supra* note 28, pp.134-135, 153.

4.2: The Legal Ground of Countervalue Nuclear Attacks

If nuclear weapons are not a prohibited means of warfare *per se*, even their first use is legally permissible in-so-far as it complies with rules regarding the methods of warfare. Therefore, in certain situations, a State can legally justify adopting a nuclear response strategy to deter conventional or nuclear attacks without invoking belligerent reprisals. This also implies that, if an enemy's nuclear attack does not constitute a violation of the LOAC, a State that is the victim of a nuclear attack cannot resort to belligerent reprisals by any means.

However, countervalue nuclear attacks cannot be justified without invoking the concept of belligerent reprisals, because such attacks primarily target protected populations and objects. Even if the prohibition of belligerent reprisals has not attained the status of customary law, States may include the prohibition of belligerent reprisals into a treaty on a consensual basis. The API is the first major treaty prohibiting belligerent reprisals against civilian populations and objects, which have been outside the scope of the protection provided by the GCs. If the API applies to the use of nuclear weapons, it would totally outlaw nuclear belligerent reprisals and would, by extension, end the deterrence strategy based on the threat of countervalue nuclear reprisals.

This is precisely the reason that some NATO members, including France and the UK, declared that they would react to violations of the API by an enemy with the appropriate means.[56] Although they deliberately avoided using the term "belligerent reprisals,"[57] these declarations substantially constituted reservations to the Articles prohibiting belligerent reprisals.[58]

Resultantly, to ensure the continued effectiveness of nuclear deterrence, these NATO members set up double lines of defense by making two reservations: first, they deny the API's applicability to nuclear weapons; second, they derogate from the API-imposed obligation of not resorting to belligerent reprisals.

Japan has remained silent on their reservations as well. Seemingly, Japan neither denies the entry into force of the API between itself and these reserving States, nor categorically rejects these declarations' compatibility with the purpose and aim of the API. Here again, we should ask: did the declarations modify for these States in their relations with Japan the relevant provisions of the API to the extent of the declarations? More directly, did Japan's lack of objection indicate that it approved the compatibility of the declarations with the API's purpose and aim?

4.3: Extended Nuclear Deterrence—Belligerent Reprisals in Defense of Allies

Whether Japan recognized these declarations' compatibility with the API or not, it is apparent that the API's provisions prohibiting belligerent reprisals are fully applicable to an IAC between Japan and one or more of the three nuclear-weapon States in the Far East, because none of them have made a reservation of this kind. In other words, these East Asian countries have made a very *humanitarian* decision, when entering the API, to renounce their right to belligerent reprisals without any effective substitutional system. As a result, Japan must also refrain from resorting to belligerent reprisals even in a hypothetical case in which an adverse party makes deliberate attacks against civilian population and objects in Japan.

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[56] Egypt issued a similar declaration. For these declarations, *see*, ICRC Database, *supra* note 35: s*ee also*, Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer, 2012, pp.226-227.

[57] Scott D. Sagan and Allen S. Weiner, "The Rule of Law and the Role of Strategy in U.S. Nuclear Doctrine," *International Security*, Vol.45, No.4, 2021, p.156.

[58] The UK, for instance, stated in the declaration formulated on its ratification that it is entitled to take measures otherwise prohibited by Articles 51 through 55, if an adverse party makes serious and deliberate attacks in violation of these Articles. However, it has also been pointed out that the recent military manuals of these States avoid openly admitting the right of belligerent reprisals. *Ibid.*; Jaen-Marie Henckaerts et al. eds., *Customary International Humanitarian Law*, Vol.1(Rules), ICRC/Cambridge Univ. Pr., 2005, p.521.

However, one may wonder that, even though Japan cannot make reprisals by itself, the US will launch such attacks for the protection of Japan following the Japan-US Mutual Security Treaty. To deter armed attacks from abroad and, if an armed attack actually occurs, to conduct joint defense operations by conventional and nuclear forces are the mainstay of this treaty. In this way, the US provides extended nuclear deterrence to Japan, as well as to other allies under similar treaties such as the North Atlantic and the ANZUS Treaties.

The question here is whether a belligerent State can resort to belligerent reprisals to defend an ally, which is being attacked in ways that violate the LOAC. In short, belligerent reprisals in defense of allies must be legal to maintain credible extended nuclear deterrence based on the threat of countervalue nuclear attacks.

In the context of general international law, in particular, that of State responsibility, the term "countermeasures" is usually used instead of "reprisals". Against the backdrop of the emergence of communitarian thoughts, some studies have recently analyzed the permissible scope of third-party countermeasures for responding to collective problems.[59] However, because even bilateral countermeasures or pacific reprisals by way of using force are not deemed legal under the UN Charter, it is all the more difficult to justify third-party countermeasures, if at all, by way of armed force.[60] In a nutshell, the only possible ground of a collective armed response by individual States is the right of collective self-defense. The current *jus ad bellum* prohibits both bilateral and collective countermeasures using force.

The problem then is whether collective reprisals are also regarded as illegal in the context of *jus in bello* or the LOAC. It is uncertain whether the logic that denies the legality of collective countermeasures or pacific reprisals using force is also valid in relation to collective belligerent reprisals. Unless the LOAC allows a State to engage in collective belligerent reprisals in defense of its friendly co-belligerent, extended nuclear deterrence based on the threat of countervalue attacks loses its effectiveness,[61] even if the customary LOAC does not exclude the legality of belligerent reprisals resorted to by a direct victim belligerent.

There is a derivative but equally important problem regarding the legal aspects of extended nuclear deterrence: even if collective belligerent reprisals are generally permissible, can a victim belligerent accepting the treaty obligation of not making belligerent reprisals ask its co-belligerent that is not bound by the treaty to resort to collective belligerent reprisals against a wrong-doing enemy State that is also a party to the same treaty? Put differently, can a co-belligerent make collective belligerent reprisals, which would be wrongful if resorted to by a direct victim belligerent?

We can examine this issue via the hypothetical scenario of a nuclear war in the Far East. Supposing that the DPRK launched a nuclear attack against Japan and caused excessive collateral damage, the first question to be answered is whether the API would apply to this attack. Both belligerents are party to the API without making any specific declaration on nuclear weapons, and hence, the answer would be affirmative unless the view indicated by the nuclear-weapon-exemption declarations of France and the UK is the only possible interpretation of the API. Consequently, the API's provisions prohibiting belligerent reprisals would also be applicable. This means that Japan could not resort to belligerent reprisals by itself. In this situation, it is conceivable and indeed

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[59] Martin Dawidowitcz, *Third-Party Countermeasures in International Law*, Cambridge Univ. Pr., 2017, pp.1-3.
[60] *Ibid*., p.66; *Nicaragua* Case, *supra* note 3, para.211.
[61] Considering that co-belligerents are closely connected to each other and that, if one of them is defeated, the other's *very survival* might be at stake, it could be argued that collective belligerent reprisals must be allowed. Michael Akehurst, "Reprisals by Third States," *British Year Book of International Law*, Vol.44, 1970, pp.7-8. The reasoning behind this is different from communitarian thoughts forming the basis of third-party countermeasures.

expected that the US, which is not a party to the API, would launch nuclear attacks by invoking the right of collective self-defense following the Japan-US Security Treaty. Of course, if these attacks do not violate the LOAC rules to which the US is bound *vis-à-vis* the DPRK, it is not necessary for the US to invoke belligerent reprisals. However, if they are in violation of these rules, the US will have to invoke belligerent reprisals, and thus, the issue of collective belligerent reprisals will emerge.

One may wonder whether asking the US to initiate collective belligerent reprisals is against Article 16 of the Articles of State Responsibility, which prohibits the provision of aid and assistance in the commission of an internationally wrongful act. Presupposing that the legality of collective belligerent reprisals is generally recognized, this question could be answered negatively because the US is not bound by the same obligation imposed on Japan in relation to the DPRK.[62] In addition, this Article would not be applicable if Japan does not actually give any aid or assistance to facilitate collective belligerent reprisals by the US.[63] However, if such subrogation is permitted, treaty provisions banning belligerent reprisals could easily be bypassed by collective belligerent reprisals by a co-belligerent not being an API party.[64]

In any event, it is difficult to maintain an extended deterrence strategy without assuming the legality of collective belligerent reprisals. Recalling that the Japanese Government has been emphasizing the importance of extended deterrence for its security, it will be interesting to know its official view on this point. The question to be asked would be: if Japan is attacked in ways that breach the LOAC by a State in the Far East, which is a party to the API, can Japan expect the US to resort to collective belligerent reprisals against the attacking State even if such a reprisal would be illegal if carried out by Japan? This question would not seem as serious in Europe because major NATO members had formulated declarations on the provisions of the API prohibiting belligerent reprisals in addition to those on the API's applicability to nuclear weapons. However, it is a serious question for all of the other non-nuclear-weapon States under the nuclear umbrella.

5. Concluding Remarks

Although the Japanese Government has remained silent on these LOAC-related technical issues, the strategic situation in the Far East has been changing, and the nuclear threshold is lowering due to vertical and horizontal nuclear proliferation.[65] Even a limited nuclear-exchange is more likely to occur.[66] This change inevitably raises the question of whether it is wise for Japan to maintain a low-profile on these issues and disregard without further examination any possibility of acquiring more favorable protection by relevant LOAC treaties such as the API.

Anti-nuclear-weapons movements in Japan should raise these issues and require the Government to clarify its official views concerning to what extent civilians and civilian objects in Japan would be protected from nuclear

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[62] Similarly, the US may use methods and means of warfare against the DPRK, which are prohibited by the API and thus illegal if adopted by Japan. This may cause legal inter-operability problems between Japan and the US.

[63] For more on a State's responsibility when placing its territory at the disposal of a wrongdoing State, *see,* ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the ILC*, 2001, Vol.2, Part 2, p.67.

[64] If the legality of collective belligerent reprisals is admitted, the US, not being bound by the API, may resort to such reprisals when Japan is attacked by the DPRK in violation of the LOAC. On the other hand, even when the DPRK is subject to illegal attacks by Japan, the DPRK can neither make belligerent reprisals against Japan nor against the US, as the DPRK is bound by the provisions banning belligerent reprisals against other API parties and the US is not responsible for illegal attacks against the DPRK by Japan.

[65] Petr Topychkanov, "Myriad Risks: Nuclear Doctrines in the Asia Pacific," *Global Asia*, Vol.16, No.2, 2021, pp.22-25.

[66] The threshold for a nuclear EMP attack could be even lower because such attacks will not cause immediate kinetic damage to civilians and civilian objects. As for the DPRK's EMP attack capability, *see,* Reiji Yoshida, "Threat of North Korean EMP Attack," *Japan Times*, 8 Sept. 2017, at https://www.japantimes.co.jp/news/2017/09/08/national/ threat-of-north-korean-emp-attack-leaves-japan-vulnerable/.

attacks by the current LOAC. This concern must be shared by other non-nuclear-weapon States, which are party to the API and the ICC Statute without formulating declarations on nuclear weapons.

Finally, a tactical question of how to obtain the official views of the Japanese Government can be briefly raised. From the lawfare point of view, as expected, the most appropriate way is to use the questioning system provided for by the Japanese Diet Law.[67] Indeed, anti-nuclear-weapons members of the Japanese Diet have often resorted to this option, which mandates that the Government answer any question from the Diet members within a week. Although the Government tends to avoid answering these inquiries directly,[68] it would not be so easy for the Government to deflect a technically precise and well-formulated legal question. Such a question can narrow the scope of the legal maneuvers of the Government and draw out more specific official views, that, in turn, can be a starting point for further discussion.

[67] Diet Law, Articles 74 and 75.

[68] As the PRC's military becomes increasingly active in the East China Sea, the Japanese Self-Defense Forces (JSDF) have begun to reinforce units in Okinawa. A member of the Diet from Okinawa, who was anxious about the possibility of a military confrontation, submitted a statement of question by using this system. He asked whether a JSDF's early-warning station in Miyako Island, Okinawa, is regarded as a military objective as defined by the LOAC. *Shitsumon-Shuisho*, No.62, 13 Dec. 2016. The Government responded that this question could not be answered in peacetime because the question of whether this installation is regarded as a military objective as defined by the API could be determined only in the circumstances ruling at the time of a specific armed conflict. *Tobensho*, No.62, 22 Dec. 2016.