Japan’s Reliance on US Extended Nuclear Deterrence: Legality of Use Matters Today

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ABSTRACT
Japan declares in its security policy that US extended nuclear deterrence is “essential”. However, policymakers do not seem to have provided sufficient explanation of the legality and the implications of the use of nuclear weapons, even if they argue that the policy of extended nuclear deterrence is essential. From the perspective of international law, three questions can be identified in examining Japan’s reliance on the US extended nuclear deterrence. The first is what the target would be in an anticipated use of nuclear weapons, a question that relates to policymakers’ understanding of nuclear deterrence. The second is whether the civilian population is a permissible target for belligerent reprisals; this question relates to the legality of countervalue strategy targeting an adversary’s cities and civilians as intolerable punishment. The third is whether countermeasures by a third party on behalf of an attacked state are permissible, a question that relates to the legal basis of Japan’s reliance on the US nuclear capabilities. These questions at the nexus of politics and law have been neither addressed in depth in deliberations in the National Diet of Japan nor examined sufficiently in scholarly research. This article addresses these questions and considers the legal challenges and the implications today that are inherent in Japan’s security policy, which relies on US extended nuclear deterrence.

Introduction
Japan is the state that suffered the two atomic bombings over Hiroshima and Nagasaki in August 1945 and is thus expected to take a leadership role in realizing a world free from nuclear weapons. On the other hand, Japan declares in its security policy that the “extended deterrence” provided by the nuclear weapons of the United States is “essential” (Japan 2013, 16). Japan also states it will “closely cooperate” with the United States to “maintain and enhance its credibility” (Japan 2018, 8). Japan did not participate in the negotiating conference for the Treaty on the Prohibition of Nuclear Weapons (TPNW)\(^1\) (Takamizawa 2017). The government indicated that it “cannot support” signing the treaty (Japan 2017), which entered into force in January 2021.

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\(^1\)Treaty on the Prohibition of Nuclear Weapons (TPNW), 7 July 2017. https://treaties.un.org/doc/treaties/2017/07/2017070703–42pm/ch_xxvi_9.pdf.

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The framework sustaining Japan’s security policy is Article 9 of the Japanese Constitution, the Treaty of Mutual Cooperation and Security between Japan and the United States of America (Japan-US Security Treaty)², the Three Non-Nuclear Principles³ and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).⁴ Under the NPT, Japan is a non-nuclear-weapon state; however, that does not mean that Japan is a state that does not rely on nuclear weapons. The record shows that the United States committed to providing nuclear deterrence for the security of Japan in the meeting between Prime Minister Eisaku Sato and President Lyndon Johnson in January 1965 (US Department of State, Office of Historian (USDSOH) 1965). The commitment was for the first time announced to the media after the meeting between Prime Minister Takeo Miki and President Gerald Ford in August 1975 (National Graduate Institute for Policy Studies (GRIPS) 1975). Japan became a party to the NPT in June of the following year (Japan 1976).

As for the security arrangement, the relationship between the two states under Japan-US Security Treaty is asymmetric: The United States acts for Japan’s security, and Japan grants the United States the use of facilities and areas in Japan (Article 5 and 6).⁵ The United States decides its nuclear strategies while Japan is not positioned to do so. Akira Kurosaki writes that Sato “combined” Japan’s security policy of relying on US nuclear extended deterrence with the Three Non-Nuclear Principle into the Four Nuclear Policies in January 1968. Sato thus “upgraded” the policy – which had been tacitly understood – to a “declared” one (Kurosaki 2006, 207–209). However, Kurosaki points out Japan’s conservative government did “not spontaneously explain” the policy to the public for fear of an outcry (Kurosaki 2006, 188).

The situation seems not so different today. Foreign Minister Toshimitsu Motegi said in a Diet session in April 2020 that there is “no contradiction” between nuclear deterrence as a practical necessity and nuclear disarmament as a future direction. He argued that deterrence and extended deterrence are “necessary, not for right or wrong” but “for the sake of one’s own security” in such a severe security environment surrounding Japan (Japan 2020). However, policymakers do not seem to give sufficient explanation on the legality and the implications of the use of nuclear weapons even if they argue that the policy of extended nuclear deterrence is “necessary” or “essential”.

The National Defense Program Guidelines for FY2005 and beyond was the first document issued by the Japanese government to put emphasis on “response” capabilities in addressing new threats and diverse situations (Japan 2004). The National Defense Program Guidelines for FY2019 and beyond stated that the objectives of national defense are first, to create a security environment desirable for Japan; second, to deter a threat from reaching Japan; and finally, to “counter” the threat and minimize damage should the threat reach Japan (Japan 2018). Meanwhile, how Japan, relying on the US extended

²Treaty of Mutual Cooperation and Security between Japan and the United States of America (Japan-U.S. Security Treaty), 1960. https://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html.
³The Three Non-Nuclear Principles of not possessing, not producing and not permitting the introduction of nuclear weapons, in line with Japan’s peace constitution, were first expressed in a statement by Prime Minister Eisaku Sato in December 1967 (Japan 1967), and the National Diet adopted the resolution in November 1971.
⁴Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 1 July 1968. 729 UNTS 161. https://treaties.un.org/doc/publication/unts/volume%20729/volume-729-i-10485-english.pdf.
⁵There is no reference to nuclear weapons or nuclear deterrence in the treaty.
nuclear deterrence, will “respond” or “counter” in the event of military hostilities by another state remains equivocal (See Bull 1981, 14). What role are nuclear weapons expected to play in such a situation?

The innovation of military technologies can impact nuclear deterrence. Technologies in precision guidance and remote sensing in one state can affect the value of “hardening” and “concealment” technologies of an adversary state, increasing the vulnerability of the adversary’s nuclear capabilities (Lieber and Press 2017, 9–13). The resulting instability may affect the motivation for one state to launch a nuclear attack on the other. It may also serve as the motivation for a nuclear arms race between the two. In addition, artificial intelligence can be a factor in strategic instability because of the uncertainty of how it will affect nuclear strategies. In view of such technological developments, what are the implications of US extended nuclear deterrence for Japan’s security?

Due to these challenges, the risk of the use of nuclear weapons is rising in the security environment surrounding Japan. Fumihiko Yoshida argues that the area around Japan has become a “hot spot of nuclear risk”. He writes that the question of how to reduce nuclear risk for Japan itself has become an “inevitable issue” (Yoshida et al. 2021). It is true that the United States, not Japan, is in a position to use nuclear weapons. Therefore, one could argue that Japan does not need to consider the use. This argument may be reinforced by the term “nuclear umbrella”, which implies a position of passivity. The rhetoric of passivity becomes reinforced when it is combined with a narrative that the nuclear umbrella is “hung over” Japan by the United States (See Sato 2017, iii, 173). The public understanding of extended nuclear deterrence in Japan seems affected by the rhetoric.

The reality seems to be different. Masakatsu Ota points out that Japan has become an “active stakeholder” in the US nuclear policy through the Extended Deterrence Dialogue (Ota 2021, 154). Does this suggest that the possibility that a policy of extended nuclear deterrence with the option of the use of nuclear weapons may be in the minds of policymakers? Is there any explanation from policymakers regarding what such an “active stakeholder” position, if any, means for Japan’s security when the risk of the use of nuclear weapons is pointed out?

Today, law of armed conflict (jus in bello) is understood as international humanitarian law (IHL) which consists of customary law as well as in treaties, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I)⁶ (See Solis 2022, 18–19). IHL regulates the means and methods of warfare. It is an established rule agreed among the states that the right of states to choose methods or means of warfare is not unlimited (Hague Regulations Article 22⁷; AP I Article 35(1)). Japan acceded to the AP I in August 2004 and to the Rome Statute of the International Criminal Court (ICC Statute)⁸ in July 2007, both of which are relevant to the regulations on the use of weapons and the implementation of the regulations.

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⁶Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977. 1125 UNTS 3. https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf.

⁷Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations). The Hague, 18 October 1907. https://ihl-databases.icrc.org/ihl/intro/195.

⁸Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998. 2187 UNTS. 38544. https://treaties.un.org/doc/treaties/1998/07/19980717%2006-33%20pm/volume-2187-i-38544-english.pdf.
From the perspective of international law, three questions can be identified in examining Japan’s reliance on US extended nuclear deterrence. The first is what the target would be in an anticipated use of nuclear weapons, a question that relates to policy-makers’ understanding of nuclear deterrence. The second is whether the civilian population is a permissible target for belligerent reprisals; this question relates to the legality of countervalue strategy targeting an adversary’s cities and civilians as intolerable punishment. The third is whether countermeasures by a third party on behalf of an attacked state are permissible, a question that relates to the legal basis of Japan’s reliance on the US nuclear capabilities.

These three questions can help clarify the implications of the obligations imposed by international law on Japan’s security policy of relying on US extended nuclear deterrence. However, these questions at the nexus of politics and law have been neither addressed in depth in deliberations in the National Diet of Japan nor examined sufficiently in scholarly research. (Fujita 1998, 7; Highsmith 2019, 3–4; Sagan and Weiner 2021, 128–130; See also Group of Eminent Persons 2019, 10–11). This article will address the questions to consider the legal challenges and the implications today inherent in Japan’s security policy of relying on the US extended nuclear deterrence.

**Targeting**

Deterrence is defined as the “power to dissuade another party from doing something which one believes to be against one’s own interests, achieved by the threat of applying some sanction” (Snyder 1960, 163–164). The essence of deterrence in terms of power is an attempt to dissuade an adversary from undertaking an undesired action “not yet initiated” (George and Simons 1994, 7). Nuclear deterrence means that a state causes an opponent to fear that an unacceptably effective counterattack will be made with nuclear weapons, thus preventing the opponent from taking military action against the first state. It is conceptualized as the combination of deterrence and nuclear weapons with immense destructive power.

The legal assessment of the policy of nuclear deterrence based on this logic first falls within the scope of Article 2(4) of the Charter of the United Nations\(^9\) which prohibits the “threat of force” (*jus ad bellum*). However, if a threat of “possible use” did not inhere in deterrence, deterrence “would not deter” (Schwebel 1996, 314). The legal assessment of the *use* in an armed conflict falls within the scope of IHL (*jus in bello*).

In the policy of nuclear deterrence, the question is usually posed in the form of what the objective of deterrence is, and the answer is to deter the state. There is no doubt that the state is object of deterrence. However, “the state” is an abstract concept that refers to a political organization governing a population within a territory, which cannot be the target of physical destruction itself with the use of nuclear weapons. Therefore, even if the state is to be deterred, it is necessary to ask what is to be damaged or destroyed with the use of nuclear weapons. In other words, the question is what the target is.

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\(^9\) Charter of the United Nations, 24 October 1945. 1 UNTS XVI. [https://treaties.un.org/doc/publication/ctc/uncharter.pdf](https://treaties.un.org/doc/publication/ctc/uncharter.pdf).
Rule of Distinction

The legal assessment of the use of nuclear weapons takes into account two “cardinal principles” of international humanitarian law. They are the rules of “distinction” and the prohibition of “unnecessary suffering to combatants”, which are regarded as “intransgressible principles of international customary law” (ICJ 1996, 257, paras. 78–79). Considering these two rules, weapons are prohibited as means of warfare if they, by nature, are inevitably incapable of observing the two rules of IHL. On the other hand, weapons are not prohibited as means of warfare per se but remain regulated by the rules applied to methods of warfare if they are deemed to be compatible with the two rules. In addition, the protection of the natural environment is also a basic rule of IHL today (AP I Article 35(3) and Article 55).

Among these, the rule of distinction pertaining to methods of warfare is intended to protect civilian populations and civilian objects and establishes a distinction between combatants and noncombatants. The AP I, which provides comprehensive provisions on this rule, defines “indiscriminate attacks”, which should be prohibited, as attacks without specific military objectives, attacks that cannot target only specific military objectives, and attacks that have an impact beyond the limits set by the AP I (Article 51(4)). It is in any event “absolutely prohibited to attack civilians” whether by nuclear or other weapons (Higgins 1996, 363, para. 12; See also Boothby 2016, 65; Greenwood 1998, 200–201).

What legal guidance does the rule of distinction provide for the use of nuclear weapons? In the era of Cold War, US Secretary of Defense Robert McNamara said he would judge that a capability to destroy “one-fifth to one-fourth” of the population and “one-half” of the industrial capacity of the Soviet Union would serve as an effective deterrent, insisting that such a level of destruction would certainly represent “intolerable punishment” to an industrial nation (McNamara 1969, 49–50). It is prohibited by the rule of distinction today for any state to carry out a destruction as intolerable punishment to “inflict 20 or 30%, or whatever level is deemed necessary” as McNamara formulated it. This means that the use of nuclear weapons under the countervalue strategy – which targets cities and civilians in an adversary state as intolerable punishment – is illegal (Sagan and Weiner 2021, 128–130). This also means that the use of nuclear weapons as a means of “deterrence by punishment” (Snyder 1960, 163) has no legal basis if the punishment entails the harm to civilian populations and civilian objects.

The states possessing nuclear weapons reflect their understanding of this strict constraint in their targeting policies. The United States proclaimed that “U.S. nuclear planning and planning adhere to the laws of armed conflict. The United States has for decades rejected a deterrence strategy based on purposely threatening civilian populations, and the United States will not intentionally target civilian populations” (US Department of Defense 2020, 6; See also 2016, 416–418, para. 6.18).

Russia made clear its position on the rule of distinction. It proclaimed that the “civilian population as such and individual civilians enjoy protection which, in addition to other international humanitarian law rules, prohibits making them an object of attack” and that

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10The rule of prohibition of unnecessary suffering intends to prohibit combatants from suffering greater pain than is inevitable in achieving military advantage (See AP I Article 35(2)). This article will not address this principle further in order to focus on the question of targeting.
“the civilian population as such, as well as individual civilians, shall not be the object of attack” (Russian Federation, Ministry of Defence 2001, § 54; See also § 7). Meanwhile, Russia also said that it “shall reserve the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and/or its allies, as well as in the event of aggression against the Russian Federation with the use of conventional weapons when the very existence of the state is in jeopardy”, without referring to the application of the law of armed conflict (Russian Federation 2014, para. 27).

China adopted the law on national defense in 1997, in which it proclaimed that China must abide by the treaties that it had concluded, acceded to, or accepted in its military relations with other states (China 1997, Article 67). China said its law contained penalties for violations of the Geneva Conventions and the AP I; members of the armed forces who committed atrocities against “innocent civilians” were thus “liable to punishment” (China 2004, 4, para. 22, 2013, Article 446). It also said it “attached great importance to the Geneva Conventions of 1949 and the Additional Protocols” and “condemned any violation” of those instruments (China 2004, 4, para. 21).

It should be noted that the 2010 NPT Review Conference expressed “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed “the need for all States at all times to comply with applicable international law, including international humanitarian law” in the Final Document (NPT Doc 2010, 19, A.v.). All the state parties agreed with “the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI” (NPT Doc 2010, 19, A.ii.).

**Incidental Harm**

In view of the rule of distinction, the only “legally permissible” objects of attack (Fleck 2021, 198, para. 7.12) are military objectives, which is often referred to in the context of nuclear weapon targeting policies as the counterforce strategy (US Congress, Congressional Budget Office 1978, 31–43). McNamara said that the United States had come to the “conclusion” that to the extent feasible, basic military strategy in a possible general nuclear war should be approached in much the same way that more “conventional military operations” had been regarded in the past. He declared that “principal military objectives”, in the event of a nuclear war stemming from a major attack on the alliance, should be the “destruction of the enemy’s forces” but “not of his civilian population” (McNamara 1962).

Even if a nuclear attack were targeted against military objectives in compliance with the rule of distinction, unintended harm to civilians and civilian objects could occur as a consequence. The AP I stipulates that “incidental” harm to civilians and civilian objects caused should not be “excessive” in relation to the “concrete and direct military advantage anticipated” otherwise the attack would be considered “indiscriminate” (Article 51(5)(b)). Launching an indiscriminate attack affecting the civilian population or civilian objects “in the knowledge” that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects, as defined in Article 57(2)(a)(iii), shall be regarded as “grave breaches” of the AP
I (Article 85(3)(b)). The AP I also stipulates the obligation to take “constant care” to avoid attacks on civilians and civilian objects (Article 57(1)), to take precautions in attack (Article 57(2)), and to take precautions against the effects of attacks (Article 58).

Therefore, the questions in practice are whether it is possible to use nuclear weapons in ways that would not violate the prohibition of attacking civilians and civilian objects, as well as the prohibition of excessive collateral damage. It should be recalled that the International Court of Justice (ICJ), in its advisory opinion in ICJ 1996 suggested that there are questions that have not been answered. The ICJ pointed out that “none” of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low-yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use. It also pointed out “none” of them indicated that whether such limited use would not tend to “escalate into the all-out use” of high-yield nuclear weapons (ICJ 1996, 262, para. 94).

Although the ICJ did not consider that it has a “sufficient basis for a determination on the validity” of the view of “clean’ use” (ICJ 1996, 262, para. 94), the questions raised by the ICJ need to be examined further in the form of the question as to whether the use of nuclear weapons without excessive collateral damage would be possible. By its very nature, the use of nuclear weapons releases not only immense quantities of heat and energy but also “powerful and prolonged radiation” that “cannot be contained in either space or time” (ICJ 1996, 243, para. 35; See also Eide 2013). The “uncontrolled effects” (Casey-Maslen 2014, 104) of the use of nuclear weapons can reside beyond the cessation of armed conflict. It should be necessary to examine whether the uncontrolled effects due to powerful and prolonged radiation does not fall within the scope of the prohibition of excessive collateral damage.

The uncontrolled effects of radiation raise another question. The AP I stipulates that a method or means of combat “the effects of which cannot be limited as required” by the AP I are prohibited as “indiscriminate” attacks (Article 51(4)(c)). A comprehensive study of customary IHL compiled for the International Committee of the Red Cross (ICRC) says that indiscriminate attacks are those that employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law (Henckaerts and Doswald-Beck 2005, 40). It also says that this rule points to “weapons whose effects are uncontrollable in time and space” (Henckaerts and Doswald-Beck 2005, 43). In light of the rules, it could be argued that nuclear attacks are indiscriminate due to the uncontrolled effects of radiation which “cannot be limited as required” by the AP I or IHL.

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11The ICC Statute stipulates that the minimum requirement for criminal liability under the statute is “intent” and “knowledge” (Ohlin 2013, 100). Intent is defined as “in relation to conduct, that person means to engage in the conduct” and “in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events” (Article 30(2)(b)).

12One could argue that a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas does not cause collateral damage to civilians or civilian objects (See UK 1995, 53, para. 3.70). Conversely, this argument only means that the use of nuclear weapons could be legalized under such “imaginary scenarios” (Lewis and Sagan 2016, 63).

13In his study on cluster munitions, Alexander Breitegger writes that AP I Article 51(4)(c) “is meant to refer to weapons or tactics that, although by their design may generally be initially targeted at military objectives then become uncontrollable in time and/or space” (Breitegger 2012, 45).
Nuclear weapons are capable of harming members of the enemy forces and civilians indiscriminately because of radioactive fallout and residual radioactivity (Meyrowitz 1982, 248). A study conducted by medical experts says that “there is no doubt that the effects will continue until 2045 (100 years after the bombings [of Hiroshima and Nagasaki]), when all the survivors are dead”. Thus, the study concludes that nuclear weapons are capable of indiscriminate “slaughter” (Tomonaga et al. 2014, 36; See also Tomonaga 2019, 503–511). Article 51(4)(c) of the AP I practically prohibits the use of nuclear weapons because the uncontrolled effects of radiation against civilians.14

Japan’s Views on the Use of Nuclear Weapons

In the record of deliberations in the National Diet, there have been quite a few debates on the constitutionality of the possession of nuclear weapons in light of Article 9 of the Constitution that renounces “war” and the “threat or use of force” as means of settling international disputes. Akira Kodaki, director general of the Defence Agency, said in April 1957 that nuclear weapons “appear to be of an offensive nature” and that the Constitution does not permit Japan to possess nuclear weapons of “this kind” (Japan 1957). This suggests that the Constitution would allow the possession of nuclear weapons if they did not have such characteristics. Two decades later, Hideo Sanada, director-general of the Cabinet Legislation Bureau, presented the government’s interpretation of Article 9 concerning the possession of nuclear weapons in March 1978 (Japan 1978). It stated the government of Japan has long interpreted Article 9(2) as saying that Japan is permitted to maintain capabilities not exceeding the “minimum necessary” for self-defense. It also stated that the possession of such capabilities, regardless of whether they are nuclear or conventional weapons, is not prohibited as long as they remain within the limits of Article 9(2). This is the government’s position on the possession of nuclear weapons and the interpretation of the Constitution to this day.

As for the legality of the use of nuclear weapons, Shuzo Hayashi, director-general of the Cabinet Legislation Bureau, stated in March 1964, that the “mere use of nuclear energy for killing or destroying” objects in combat would not be an immediate violation of the Constitution (Japan 1964). The reference to the use of “nuclear energy” as a means of warfare can be seen as the starting point of discussions on the use of nuclear weapons. In June 1998, Masasuke Omori, director-general of the Cabinet Legislation Bureau, referring to the statement by Sanada in April 1978, said it would be “logical” to say that the use of nuclear weapons is “possible” if it is limited to the “minimum necessary” for the defense of Japan (Japan 1998). In March 2016, Yusuke Yokohata, director-general of the Cabinet Legislation Bureau, confirmed the position of the government by quoting the past statements of Hayashi in 1964, Sanada in 1978, and Omori in 1998 (Japan 2016).

Regarding the use of nuclear weapons under international law, Hisashi Owada, director-general of the Treaties Bureau in the Ministry of Foreign Affairs, stated in July 1984 that nuclear weapons do not conform to the “spirit of humanity” underlying international law. However, he continued that the use of nuclear weapons is “not prohibited” under international law at the present time. Owada also mentioned that the “permissible range of the use of nuclear weapons” based on the current provisions of

\[14\text{See supra note 10.}\]
international law will “inevitably emerge” (Japan 1984). In its written statement to the ICJ in June 1995, Japan said that the use of nuclear weapons is certainly contrary to the “spirit of humanity” that gives international law its philosophical foundation because of their “immense power to cause destruction, the death of and injury to human beings” (Japan 1995). This view avoided addressing the legal questions of the use of nuclear weapons.

The views expressed in deliberations in the National Diet consider that the use of nuclear weapons beyond limits established by Article 9 of the Constitution is not permissible and is illegal. From the perspective of IHL, the “minimum necessary” limits Japan sets as its own standard can be assessed by the rule of distinction and the prohibition of excessive collateral damage, both of which regulate the use of nuclear weapons. Thus, two questions arise here. What is the target in an anticipated use of nuclear weapons? Is it possible to use nuclear weapons without excessive collateral damage in view of their uncontrolled effects of radiation? However, discussions of these questions seem to be few and far between in the deliberations of the National Diet. These are questions for the examination of the “permissible range of use of nuclear weapons” that have not yet been fully examined in deliberations in the National Diet.

**Belligerent Reprisals**

Belligerent reprisals are actions that would otherwise be unlawful but that in exceptional cases are considered lawful when countering unlawful acts of an adversary violating IHL (ICRC n.d.a). The doctrine of belligerent reprisal allows an attacked state to preclude the wrongfulness of its attacks against the civilian population and civilian objects of the attacking state. The idea of belligerent reprisals with the use of nuclear weapons is well summarized in the statement of the Netherlands in 1995. It said that even if the use of nuclear weapons by a state were assumed unlawful under present international law, this “would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons”, provided the retaliating state observed the conditions set by international law (The Netherlands 1995, 12, para. 29).

Although reprisals with the use of force are rendered unlawful under Article 2(4) of the Charter of the United Nations (*jus ad bellum*)\(^\text{15}\), belligerent reprisals are understood to be lawful as measures to ensure compliance with IHL (*jus in bello*) unless otherwise stipulated in specific international treaties. Belligerent reprisals are deemed law enforcement measures under strict requirements to bring the adversary in breach of IHL back into compliance in a decentralized international society. Thus, the doctrine of belligerent reprisal provides the legal basis for the use of nuclear weapons under the countervalue strategy, as they preclude the wrongfulness of attacking civilians or civilian objects prohibited by the rule of distinction in IHL (Mayama 2014, 13). However, in light of the risk of abuse, a question arise whether international law provides no regulations on belligerent reprisals.

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\(^{15}\)This also means reprisals without the use of force – pacific reprisals – remain lawful in principle as countermeasures in a decentralized international society (Dawidowicz 2018, 18).
The Fourth Geneva Convention\textsuperscript{16} stipulates that “[r]eprisals against protected persons and their property” are prohibited (Article 33). However, persons protected by the convention are those who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals” (Article 4). According to the stipulation, it is not understood that a countervalue strategy intending to attack civilians in the territory of an adversary state is prohibited. The AP I makes it clear that “[a]ttacks against the civilian population or civilians” by way of reprisals are prohibited (Article 51(6)) and that “[c]ivilian objects shall not be the object of attack or of reprisals (Article 52(1)). It also stipulates the prohibitions of reprisals against objects indispensable to the survival of the civilian population (Article 54(4)), works and installations containing dangerous forces (Article 56(4)), and the natural environment (Article 55). In the area of state responsibility, the Draft Articles on the Responsibility of States for Internationally Wrongful Acts stipulates that “countermeasures shall not affect” the “obligations of a humanitarian character prohibiting reprisals” (ILC 52nd 2001, 131, Article 50(1)(c)).

According to these provisions of the AP I, parties to the protocol are prohibited from attacking the civilian population or civilians and civilian objects in belligerent reprisals. As Russia (ICRC n.d.b), China (ICRC n.d.c) and the Democratic People’s Republic of Korea (DPRK) (ICRC n.d.d) are parties without reservations to the provisions, they are bound by these obligations. On the other hand, the United Kingdom and France made declarations to express their positions on the provisions when becoming parties. The United Kingdom stated that the obligations of Articles 51 and 55 are accepted “on the basis that any adverse party … will itself scrupulously observe those obligations”. The United Kingdom also said that it will regard itself as entitled to take measures otherwise prohibited by the articles in question “to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles” (ICRC n.d.e). France stated that the interpretation of Article 51 does not prevent the use, in accordance with international law, of the means that France deems essential to protect its civilian population from serious, manifest, and deliberate violations of the Geneva Conventions and of the AP I by the enemy (ICRC n.d.f).

\textbf{Application of AP I to Nuclear Weapons}

Before considering the questions surrounding belligerent reprisals attacking civilian population or civilians and civilian objects with nuclear weapons, it is necessary to address the question of whether the AP I applies to the use of nuclear weapons. The United Kingdom’s declarations when it ratified the AP I reconfirmed the state’s position that it rejects the application of the new rules introduced by the AP I to nuclear weapons (ICRC n.d.e). France also declared that it continues to believe that the provisions of the AP I relate exclusively to conventional weapons and that they cannot regulate or prohibit

\textsuperscript{16}Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949. 75 UNTS 287. https://treaties.un.org/doc/publication/unts/volume%2075/volume-75-i-973-english.pdf.
the use of nuclear weapons (ICRC n.d.f; See also Breton 1987, 548–549). Furthermore, some NATO states that do not possess nuclear weapons became parties by declaring that the provisions of the AP I do not apply in the case of the use of nuclear weapons.17

Views of the states participating the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974–77) were divergent regarding the question of nuclear weapons, and the states possessing nuclear weapons were negative about addressing it (Sandoz, Swinarski, and Zimmermann 1987, 591, para. 1844). Although agreement was reached “not to discuss” nuclear weapons during the four sessions of the diplomatic conference, it does not mean that the AP I invalidates the general rules applicable to all methods and means of warfare, including nuclear weapons (Sandoz, Swinarski, and Zimmermann 1987, 593, para 1852).

The ICJ, in its 1996 advisory opinion, stated that there was no “substantive debate” on the nuclear issue and “no concrete solution” to this question was offered at the Diplomatic Conference. The ICJ observed the AP I “in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons” (ICJ 1996, 259, para. 84). The ICJ also recalled that all states are bound by the rules in the AP I that, when adopted, were “merely the expression of the pre-existing customary law” such as the Martens Clause.18 Thus, the ICJ pronounced the fact that certain types of weapons were “not specifically dealt with” by the diplomatic conference “does not permit the drawing of any legal conclusions” relating to the substantive issues that the use of such weapons would raise (ICJ 1996, 259, para. 84). This view is incompatible with the view of France that the provisions of the AP I relate exclusively to conventional weapons and that all provisions, including customary law, reflected in the AP I do not apply to nuclear weapons.

The United Kingdom took the position that it does not deny that the rules of customary law apply to nuclear weapons, stating that “the rules introduced by the Protocol [AP I] apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons” (UK 1998). The United States, which had signed but not ratified the AP I, had already made the same point in a military manual in 1956 (US Department of the Army 1956, 18, para. 35). It later made it clear that it is “legally bound by the rules” contained in the AP I “only to the extent that they reflect customary international law”, while maintaining that the AP I “cannot serve in itself” as the baseline for the “establishment of common rules to govern the operations of military alliances” (Matheson 1987, 420–421; See also CDDH 1978, 295, para. 82).

What, then, is legal nature of the declarations by the states relying on nuclear weapons that the AP I does not apply to the use of nuclear weapons? One position is that there is a “consensus”, which was not formalized in writing at the diplomatic conference, that the

17Belgium, Canada, Germany, Italy, the Netherlands, and Spain (Boothby 2012, 79). The United States participated in the diplomatic conference and signed but did not ratify the AP I (Corn et al. 2012, 226–227).

18Martens Clause is named after a declaration of Fyodor Fyodorovich Martens at the Hague Peace Conferences of 1899. It has acquired the status of a customary rule and has been adopted by other ihl instruments. The effect of the clause is to underline that in cases not covered by ihl treaties, persons affected by armed conflicts will never find themselves completely deprived of protection. Instead, the conduct of belligerents remains regulated at a minimum by the principles of “the law of nations”, “the laws of humanity”, and from “the dictates of public conscience” (ICRC n.d.g; See also Schmitt 2010, 800–801).
AP I does not apply to the use of nuclear weapons. Henri Meyrowitz writes that the use of nuclear weapons is subject to the general prohibitions and limitations imposed by customary international law concerning the choice of targets and the conditions of attack. He argues that the UK declarations confirm the “consensus” and is “not legally necessary” and that the “nuclear clause” is not a reservation and is not subject to acceptance or objection (Meyrowitz 1982, 229–251).

The other position denies the “consensus”. Michael Bothe, Knut Ipsen and Karl Joseph Partsch write that it is clear that the use of nuclear weapons is also covered by the AP I because of the wording, systematic linkage, and regulatory purpose of Articles 51, 52, and 57. They say that the approach to interpretation stipulated in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) leads to the clear conclusion that the effects of the use of nuclear weapons are also covered by the AP I. They argue that it is not reasonable to infer that there is a consensus that the use of nuclear weapons should not be covered by the AP I. Thus, they say states wishing to exclude the application of the AP I to the use of nuclear weapons cannot avoid formulating a “reservation” clarifying their intent (Bothe, Ipsen, and Partsch 1978, 43, para. 2.5.3).

Declarations of Non-application and Response of Other States

The question today is which of these two positions is taken by the parties to the AP I – a question that is critical to the states whose security policies relying on nuclear weapons. The former position would mean that the new rules of the AP I do not apply to the use of nuclear weapons. The latter position would raise a question as to whether it is permissible to formulate a reservation to the AP I. Since the AP I does not prohibit a reservation, it is understood that it is permissible to formulate one (Gaudreau 2003, 1–2). The next question about the reservation is whether it is compatible with the “object and purpose” of the AP I (VCLT Article 19 (c)). However, even if the reservation that may not be compatible with the object and purpose of the AP I is formulated, how to respond to it in practice depends on the “attitude of non-reserving States” (Hampson 1988, 834).

Among the other parties, Russia, China, and the DPRK, which possess nuclear weapons, remain silent on the declarations that the AP I does not apply to the use of nuclear weapons. If these three parties are in a position to acknowledge the “consensus”, as Meyrowitz argues, they would consider the new rules of the AP I do not apply to nuclear weapons. On the other hand, if they do not acknowledge the “consensus”, as Bothe et al. argue, they would interpret the declarations as reservations. Since they did not object to the reservations within the time limits, the reservations are deemed accepted (VCLT Article 20 (5)). The provisions of the treaty pertaining to the reservations are modified “to the same extent” as the reservations for those three parties in its relations with the reserving states (Article 21(1)(b)), and the AP I does not apply to nuclear weapons. In addition, Russia, China, and the DPRK cannot make the same reservations as the reserving states (VCLT Article 19).

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19 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969. 1155 UNTS 331. https://treaties.un.org/doc/treaties/1980/01/19800127%2000-52%20am/ch_xxiii_01.pdf.
As for the other states possessing nuclear weapons, the United States, India, Pakistan, and Israel are not parties to the AP I. Therefore, those states are not bound by the obligation to prohibit attacks against civilian population or civilians and civilian objects by way of belligerent reprisals. However, it is noteworthy that the International Criminal Tribunal for the former Yugoslavia (ICTY) judged that “an international rule of customary law has emerged” on the prohibition of attacks against civilian population or civilians by way of belligerent reprisals (ICTY 2000, 207–209, paras. 527–531). With this view, the use of nuclear weapons against civilian population or civilians by means of belligerent reprisals would be considered illegal. This also broaches the question of whether the United Kingdom and France could claim the doctrine of belligerent reprisals for attacking the civilian population or civilians against an emerging customary law regardless of their declarations on Article 51(6) of the AP I.

**Japan’s Silence**

Japan has also been silent on the declarations. If this means a position acknowledging the “consensus”, Japan would consider that the new rules of the AP I do not apply to nuclear weapons. On the other hand, if Japan does not acknowledge the “consensus”, it would interpret the declarations as reservations. Since it did not object to the reservations within the time limits set by the VCLT, the reservations are deemed accepted (VCLT Article 20(5)). The provisions of the treaty pertaining to the reservations are modified “to the same extent” as the reservations for Japan in its relations with the reserving states (VCLT Article 21(1)(b)), and the AP I does not apply to nuclear weapons. In addition, Japan cannot make the same reservations as the reserving states (VCLT Article 19).

If Japan takes the position of denying the application of the AP I to the use of nuclear weapons, even under the protection of Article 51(6), Japan is supposed to assume that attacks against the civilian population or civilians under the countervalue strategy would be lawful when they were conducted with nuclear weapons. It requires careful examination whether this understanding would be beneficial to Japan’s security. When considering this question, it may be necessary to factor in the fact that Russia, China and the DPRK are under the obligation of Article 51(6) with no reservations.

On the other hand, if Japan takes the position of acknowledging the application of the AP I to the use of nuclear weapons, a nuclear attack against the civilian population or civilians under the countervalue strategy would be illegal for Japan. Thus, a question arises as to whether Japan would be legally allowed to request the United States to carry out such an illegal act as a party to the AP I. As for the United States, which would be the recipient of the request, a question arises as to whether a third party unharmed would be allowed to carry out collective belligerent reprisals against the attacking state on behalf of Japan. This is the point of contention that calls into question the legality of extended nuclear deterrence itself, which will be explored in the next section.

With regard to the obligations under the AP I, there seem to be issues that have not yet been considered, not only in deliberations in the National Diet but also in the practice of defense and diplomacy. Toshihiro Aiki, who was director of the Ministry of Foreign Affairs and was involved in the development of the domestic legislation when Japan became a party to the AP I, writes that the Self-Defense Forces use force only to the extent
necessary to defend Japan, as stipulated in Article 88(1) of the Self-Defense Forces Law. He continues that this is the case when an armed attack against Japan occurs and the requirements for the right of individual self-defense are met. He explains that such a case is considered to be a situation of international armed conflict in which Japan is a party, and Japan needs to comply with international humanitarian law applicable to international armed conflict. However, Aiki does not go beyond saying that the implementation of the relevant rules of international humanitarian law in Japan is “ensured” pursuant to Article 88 (2) of the Self-Defense Forces Law (Aiki 2007, 59).

Third-party Countermeasures

Extended deterrence refers to a situation in which policymakers “threaten military retaliation against another state” in an attempt “to prevent that state from using military force against an ally” (Huth 1988, 16). When such a threat is made with nuclear weapons, it is called extended nuclear deterrence. The question here is what the basis for extended nuclear deterrence under international law is. If a state suffers an armed attack, an ally of the attacked state can legally use force against the attacking state by way of collective self-defense upon the request of the attacked state (ICJ 1986, 120, para. 232). The right of collective self-defense permits the use of force by the ally under *jus ad bellum*. Also, the choice of means and methods of warfare during the hostilities in the armed conflict must be in accordance with *jus in bello* (IHL).

In the policy of extended nuclear deterrence, an ally with nuclear weapons not under attack is supposed to use nuclear weapons on behalf of the attacked state. If the counter-value strategy is taken in response, it is illegal under the rule of distinction in IHL because it is targeting civilians and civilian objects. However, the doctrine of belligerent reprisal precludes the wrongfulness of the violation of the rule of distinction. The question here is whether a third state, an ally unharmed, is allowed to take belligerent reprisals against the attacking state on behalf of the attacked state (Akehurst 1970, 1). This is relevant because, in general, reprisals refer to a form of unilateral measure of self-help which has long been recognized as a feature of a decentralized international society (Dawidowicz 2018, 3–4). Thus, there arises the question of what the legal basis of Japan’s reliance on the US nuclear capabilities is.

Today, the use of force is rendered illegal under Article 2(4) of the Charter of the United Nations (*jus ad bellum*). Collective security measures are supposed to be taken under the UN Charter Chapter VII to counter illegal acts of armed attack. Also, an individual or collective right of self-defense (*jus ad bellum*) is to be exercised in response to an armed attack until measures are taken by the UN Security Council (UN Charter Article 51). This international security framework supposes that states that are not directly affected by an armed attack can counter the illegal acts of the armed attack either under the authority of the United Nations or by collective self-defense. The ICJ pronounced that the lawfulness of the use of force by a state in response to a wrongful act of which “it has not itself been the victim” is not admitted when this wrongful act is “not an armed attack”. It is admitted only when the wrongful act was “an armed attack” (ICJ 1986, 110, para. 211).
Given this framework and logic, it would seem permissible for states that are not affected directly to collectively counter the unlawful conduct of hostilities in an armed conflict caused by an armed attack until measures are taken by the UN Security Council. This point might appear to be parallel to the logic employed on the “[i]nvocation of the responsibility” of another state by a state other than an injured state (ILC 53rd 2001, 126, Article 48), and “[m]easures” taken by a state other than an injured state (ILC 53rd 2001, 137, Article 54), both in the area of state responsibility. The special rapporteur on state responsibility of the International Law Commission (ILC), James Crawford, stated that, as a tentative conclusion, it “does not seem inconsistent” with the principle embodied in Article 48 of the Draft Articles of State Responsibility to recognize taking “countermeasures” by a third state “with the consent” of the injured state (ILC 52nd 2000, 105, para 401).

However, the ILC did not take a position on the question of third-party countermeasures by avoiding the term “countermeasures’ and instead using “lawful measures” in Article 54 of the Draft Articles of State Responsibility, considering that the question is “extremely controversial” (Dawidowicz 2018, 107–110). The report of the ILC stated that the current state of international law on countermeasures taken in the general or collective interest is “uncertain” and that state practice is “sparse” involving a limited number of states. Thus, it pointed out that there appears to be “no clearly recognized entitlement” of states mentioned in Article 48 to “take countermeasures in the collective interest” at present (ILC 53rd 2001, 139, (6)).

**Legal Basis of Japan’s Policy in Question**

How, then, would it be considered if the United States used nuclear weapons under the countervalue strategy to launch an attack against the attacking state on behalf of Japan? The first test is to clear the rules in *jus ad bellum*, which relates to the question of whether the use of force is permissible. Based on the Japan-US Security Treaty, the use of force by the United States would be legal under the right of collective self-defense in response to an armed attack to Japan.

The second test is whether the United States would be allowed to carry out belligerent reprisals on behalf of Japan. This relates to the legal assessment of countermeasures taken by a third party other than the affected state. In the course of discussions on the Draft Articles of State Responsibility Japan made the following statement:

Article 54, paragraph 1, allows “States other than the injured State” (referred to in this document as “interested States”) to take countermeasures “at the request and on behalf of any State injured . . . to the extent that that State may itself take countermeasures” in the case of a multilateral obligation “established for the protection of a collective interest” and of an “obligation . . . to the international community as a whole” (art. 49). This is, in essence, to entitle an “interested State” to surrogiate a right of an injured State to take countermeasures. This may have a certain meaning, in that unlawful situations will not be left unresolved, in case an injured State is not able to take countermeasures by itself. However, such a subrogation system of countermeasures does not have a basis established in international law. Such a development is a matter of primary rules. Introducing such a new system as a secondary rule may negatively affect the development of the primary rules. Also, it may involve more risk of abuse than the benefit (ILC 52nd 2001, 93).
According to this position, a question arises. What is the “basis established in international law” for Japan to request the United States to use nuclear weapons under a countervalue strategy by way of belligerent reprisals on behalf of Japan? This position leads to ask the next question: What is the “basis established in international law” that would make it legal for the United States, a third party unharmed, to carry out belligerent reprisals against the attacking state on behalf of Japan?

These questions do not appear to have been examined in deliberations in the National Diet. Looking at the record of deliberations, there is a view of the government that it is “not appropriate” to “exclude the possibility of the US use nuclear weapons” given the standpoint of “deterrence” (Japan 1985). However, there seem to be no discussions of the legal basis for the US use of nuclear weapons on behalf of Japan under the countervalue strategy, whether and how Japan would be involved in the process of the use, and how the involvement would be assessed under international law. Japan’s “National Security Strategy” says that the “extended deterrence” of the United States with nuclear deterrence at its core is “indispensable” and that Japan will “work closely” with the United States and take appropriate measures through its own efforts (Japan 2013). However, there is no explanation of either how Japan will work with the United States or what basis there is in international law for such cooperation.

The policy of extended nuclear deterrence based on the threat of countervalue attacks “could lose its effectiveness” unless the legal basis of IHL is provided, which “allows a state to engage in collective belligerent reprisals” to respond on behalf of its ally (Mayama 2022, 131). This has significant implications for Japan’s security policy, which relies on US extended nuclear deterrence for its credibility.

**Conclusion**

IHL sets a high standard for the legality of the use of nuclear weapons. Policymakers in Japan are accountable for answering the question of what the target is in an anticipated use of nuclear weapons. They also need to answer the question of whether the use of nuclear weapons without excessive collateral damage is possible in view of its uncontrolled effects of radiation.

The obligations imposed by IHL and the rapid innovation in military technologies today may give the counterforce strategy the opportunity to be reassessed. The technologies of precision targeting and remote sensing are becoming more widely available (Lieber and Press 2017, 9–13). This may bring about a possible impact on policy discussions over how nuclear weapons are viewed, either as weapons which cannot be used (Brodie 1946, 62; Jervis 1989, 226–257) or as weapons which can be used (Borden 1946, 116). However, arguments promoting the counterforce strategy are inconsistent with the “the unequivocal undertaking of the nuclear-weapon States

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20 It should be recalled that the “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” in the ICJ advisory opinion (ICJ 1996, 266, para. 105(2)E).
to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI”, agreed at the 2010 NPT Review Conference.

No matter how much military technologies advance, it is likely that collateral damage will occur in view of the destructive power of nuclear weapons (See Glaser and Fetter 2005, 93–95). As the ICJ pointed out, “no states” advocating the possibilities of a limited use of nuclear weapons indicated what the “precise circumstances justifying such use” would be and whether such limited use “would not tend to escalate into the all-out use of high yield nuclear weapons” (ICJ 1996, 262, para. 94). These questions remain unanswered.

IHL has come to be used as the term to refer to the same set of rules that the law of armed conflict (jus in bello) stipulates. This signifies a major shift in jus in bello toward valuing humanitarian considerations that corresponded to the shift in the view of war in the past century. There is no doubt that the range of permissible collateral damage is limited because of humanitarian considerations. The use of nuclear weapons under a flawless counterforce strategy is conceptually possible but practically impossible. Therefore, there remain reasonable doubts about the legality of the use of nuclear weapons even under the counterforce strategy. In this context, it should be recalled that Japan is under the obligation of the ICC Statute, which stipulates that a person who is aware that a “consequence” will occur “in the ordinary course of events” has “intent” (ICC Statute Article 30(2)(b)) for criminal responsibility (ICC Statute Article 30(1)).

The use of nuclear weapons in the countervalue strategy to attack cities and civilians by way of belligerent reprisals has no legal basis if Japan acknowledges the application of the AP I to nuclear weapons. This constraint would greatly undermine the credibility of US extended nuclear deterrence. If Japan denies the application, even under the protection of Article 51(6) of the AP I, attacks against the civilian population or civilians under the countervalue strategy would be lawful when they were conducted with nuclear weapons. Which of these two interpretations the Japanese government supports is an important question for Japan’s security.

Moreover, what is “a basis established in international law” (ILC 52nd 2001, 93) for Japan to request the United States to use nuclear weapons under the countervalue strategy under the doctrine of belligerent reprisals? Also, what is “a basis established in international law” that would make it legal for the United States, a third party unharmed, to carry out belligerent reprisals against the attacking state on behalf of Japan? These questions relating to the legal basis of Japan’s reliance on US nuclear capabilities do not appear to have been examined in either the deliberations in the National Diet or in the practice of defense and diplomacy in Japan.

Then, what will Japan do? Policymakers need to answer all these questions to ensure the legality of a security policy that relies on US extended nuclear deterrence. Insofar as concerns exist about the legal basis of the current policy, it is necessary to be cautious about claims that the sustainability of the policy can be assured toward the future. This is because such concerns have implications for the credibility of the policy. This is the

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21 As for a precedent in this regard, the ICTY found intent of murder when the perpetrators had “knowledge of the probability” that an attack would cause death (ICTY 2005, 110, para. 240; See also ICTY 2008, 103–104, para. 276).
reason alternative options need to be examined. The next question in the examination is whether it is reasonable to exclude the TPNW from those options.

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