

Disinformation and the Law of Armed Conflict*

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Abstract

Though dispatching and spreading disinformation may ordinarily be regarded as malicious activities, disinformation has been used as one of the ruses of war during wartime since ancient times. In addition, there is the provision that disinformation as a ruse of war may be not prohibited under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). However, the precondition of disinformation as a ruse of war is that the disinformation does not violate the law of armed conflict. On the other hand, generally, dispatching disinformation cannot be regarded as an attack under the law of engagement because disinformation may only influence human cognition and does not have physical force. Nevertheless, this study will demonstrate that dispatching disinformation under special circumstances may fall under illegal combat methods, based on an in-depth examination of the regulations of the law of engagement (Additional Protocol I). Therefore, when countering enemy disinformation during an armed conflict, attention will need to be paid to the above point.

Introduction: Statement of the Problem

Immediately after the 2024 Noto Peninsula Earthquake in Japan, much information was posted on social media, including rescue requests or reports on the state of damage. However, disinformation was also circulated, reportedly resulting in negative impacts such as the disruption of life-saving and rescue operations.¹ Therefore, dispatching and spreading disinformation may ordinarily be regarded as antisocial and malicious activities. On the other hand, disinformation has been used against enemies as one of the ruses of war during wartime and armed conflicts since ancient times. So, there is a widely shared understanding in the international community that dispatching and using disinformation as a ruse of war during armed conflicts is lawful. For example, Germany states in its manual on (international) humanitarian law² (the law of armed conflict) that “It is

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¹ Cabinet Office, Public Relations Office, “Intanetto Jo no Nisejoho ya Gojoho ni Gochui!” [Beware of Disinformation and Misinformation on the Internet!], March 27, 2024, <https://www.gov-online.go.jp/article/202403/entry-5920.html>.

² Together with the term “law of armed conflict,” which evolved from international law in wartime (the law of war), the term “international humanitarian law” has also come into widespread use since the 1970s. Initially, “international humanitarian law” was used to refer only to law concerning the protection of persons and objects such as victims of armed conflict (Geneva Law), but today, it is often used interchangeably with the law of armed conflict as a term referring to the law of armed conflict as a whole. Iwasawa Yuji, *Kokusaiho (Dai 2 Han)* [International Law, 2nd ed.] (Tokyo: Tokyo Daigaku Shuppankai [University of Tokyo Press], 2023), p. 726.

permissible to engage in political and military propaganda by spreading even false information to undermine the adversary's will to resist and to influence the military discipline of the adversary (e.g. instigation to defect)."³ Furthermore, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter referred to as "API"), applicable to international armed conflicts, contains a provision indicating that the use of disinformation as a ruse of war is not prohibited (Article 37, paragraph 2). However, for disinformation to qualify as a ruse of war, it must "infringe no rule of international law applicable in armed conflict" (Article 37, paragraph 2, second sentence). Nevertheless, API does not explicitly specify what kinds of disinformation may violate the law of armed conflict. Given the remarkable capacity for information dissemination today due to the widespread use of the Internet, social media, smartphones, and other technologies, preemptively analyzing and examining which kinds of disinformation may violate the law of armed conflict will surely be essential for taking effective measures to counter disinformation from enemy countries⁴ when one's own country becomes a party to an armed conflict.

Therefore, this study will, as a prerequisite for analyzing and examining whether the dispatch of disinformation violates the law of armed conflict, first confirm the content (overview) of the law of armed conflict, the significance of violations thereof, and the conditions that, when met, would constitute such violations, and identify points that require attention in such analysis and examination. Subsequently, it will examine actual examples of disinformation during armed conflicts. Based on these, it will focus on several issues regarding the dispatch of disinformation that may be considered violations of the law of armed conflict, and conduct analysis and examination thereof. Finally, based on these considerations, it will confirm points that require attention from a legal (international law) perspective in relation to responses to disinformation during armed conflicts. In light of the purpose of this study, the armed conflicts assumed as the premise for analysis and examination here are international ones, including those that could be interpreted as being international.⁵

1. Rules of the Law of Armed Conflict

In the era when war was permitted under international law, it was understood that during wartime,

³ The Federal Ministry of Defence of the Federal Republic of Germany, *Humanitarian Law in Armed Conflicts: Manual* (hereinafter referred to as "German Manual"), August 1992, para. 474.

⁴ Examples of enemies, other than enemy countries, that have the status of being a subject of international law include organizations and entities that have acquired it through recognition of belligerency. However, the enemy during (international) armed conflicts is fundamentally the enemy country.

⁵ Regarding the legal nature of the armed conflict between Israel and Hamas (Palestine) that began in October 2023, continues at the time of the writing of this thesis (July 2024), and is addressed in Section 3 (3) of this thesis, on May 20 of this year (2024), the Prosecutor of the International Criminal Court explained in a statement regarding the applications for arrest warrants for the Israeli Prime Minister and others that this armed conflict is one in which an international armed conflict between Israel and Palestine and a non-international armed conflict between Israel and Hamas run in parallel. For this reason, the provisions that serve as grounds for criminal responsibility for intentionally directing attacks against a civilian population, as indicated in the arrest warrant, are rules applicable to international armed conflicts (ICC Statute, Article 8(2)(b)(i)) or rules applicable to armed conflicts not of an international character (ICC Statute, Article 8(2)(e)(i)). However, verification of the precise legal nature of this armed conflict and its theoretical basis is beyond the scope of this thesis and should be the subject of a separate examination. "Statement of ICC Prosecutor Karim A.A. Khan KC," Office of the Prosecutor, last updated May 20, 2024, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

various rules of international law different from those when applicable in peacetime, namely, international law in wartime (law of war), would apply.⁶ International law in wartime was said to consist of the law of engagement, which governs relations between belligerents, and the law of neutrality, which governs relations between belligerents and neutral states.⁷ However, with the outlawing of war and the establishment of the duty of peaceful settlement of disputes and the principle of non-use of force as fundamental principles of international law, the concept of international law in wartime can, theoretically, no longer be valid today. Nevertheless, international armed conflicts themselves may still occur, as demonstrated when Russia initiated its invasion of Ukraine in 2022 and armed conflict broke out between the two countries. Although the outlawing of war and establishment of the principle of non-use of force have led to some fundamental changes to the content of traditional international law in wartime, particularly regarding the law of neutrality, conventional international law in wartime is today conceived of as the law of armed conflict (or international humanitarian law)⁸ and continues to exist as a field of international law consisting of the law of engagement and the law of neutrality.⁹ The main content thereof and the points that require attention are as follows.

(1) *The Law of Engagement*

The law of engagement is broadly divided into rules regulating the methods and means of warfare and rules concerning protection of victims etc. of armed conflict; the former is sometimes referred to as the Hague Law and the latter as the Geneva Law.¹⁰

Regarding methods of warfare, the fundamental principle is the principle of military objectives (the principle of distinction¹¹),¹² which requires parties to distinguish targets during attacks, prohibits the targeting of civilians and civilian objects, and strictly limits targets to military objectives when attacking (AP I, Article 48, 51(2) and 52). Rules derived from this principle include the prohibition of indiscriminate attacks (AP I, Article 51, paragraph 4), the obligation to take constant care to spare civilians and civilian objects from attacks (AP I, Article 57, paragraph 1), the prohibition of starvation of civilians as a method of warfare (AP I, Article 54), and the principle of proportionality. The principle of proportionality means that incidental damage to

⁶ Iwasawa, *Kokusaiho*, p. 726.

⁷ Kurosaki Masahiro, Sakamoto Shigeki, Nishimura Yumi, Ishigaki Tomoaki, Mori Tadashi, Mayama Akira, and Sakai Hironobu, *Boei Jitsumu Kokusaiho* [Law of Armed Conflict and International Security: A Practitioners' Manual] (Tokyo: Kobundo [Kobundo, Publishers], 2021), p. 322; Shinobu Junpei, *Senji Kokusaiho Kogi (Dai I Kan)* [Lectures on International Law in Wartime, vol. 1] (Tokyo: Maruzen [Maruzen, Publishers], 1941), p. 2.

⁸ Iwasawa, *Kokusaiho*, p. 726. See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (hereinafter referred to as "UK LOAC Manual") (Oxford: Oxford University Press, 2004), para. 1.2. However, the United States still refers to it as the law of war. See United States General Counsel of the Department of Defense, *Department of Defense Law of War Manual* (hereinafter referred to as US LOW Manual), June 2015 (updated December 2016).

⁹ There is also a view that the law of armed conflict, in its broad sense, includes both the law of engagement and the law of neutrality, but in its narrow sense, refers only to the law of engagement. Iwasawa, *Kokusaiho*, p. 726.

¹⁰ Emily Crawford and Alison Pert, *International Humanitarian Law*, 2nd ed. (Cambridge: Cambridge University Press, 2020), p. 33.

¹¹ In manuals and elsewhere other than in Japan, expressions such as "the principle of distinction," "the principle of discrimination," or "the principle of identification" are used. See UK LOAC Manual, para. 2.5.1; US LOW Manual, para. 2.5.

¹² Human military objectives are fundamentally combatants, but for the definition of physical military objectives, see AP I Article 52, paragraph 2.

civilians and civilian objects from attacks on military objectives must not be excessive in relation to the “concrete and direct military advantage anticipated.”¹³ Rules derived from the principle of proportionality include the obligation to take various precautions against damage in attacks (AP I, Article 57, paragraph 2) and, as a related rule, the obligation to take precautions against the effects of attacks (AP I, Article 58). Furthermore, when military objectives are works or installations containing dangerous forces such as dams or nuclear electrical generating stations, attacks on such works or installations are prohibited if the release of dangerous forces from the works and installations by the attack would cause severe losses among the civilian population (AP I, Article 56, paragraph 1). Additionally, as detailed rules of the principle of military objectives, attacks are prohibited against persons clearly expressing their intention to surrender and others who are or should be recognized as *hors de combat* because of incapacitation by wounds or sickness, etc., as well as persons parachuting from aircraft in distress excluding airborne troops (AP I, Articles 41 and 42). Moreover, in relation to protection of victims of combat, even in attacks on military objectives, the killing, injuring, or capturing of an adversary through perfidy intended to invite and betray the confidence of an adversary over rights to protection or obligations to accord protection are prohibited (AP I, Article 37, paragraph 1), and making civilians or civilian objects the objects of reprisals is also prohibited (AP I, Article 51, paragraph 6, and Article 52, paragraph 1). Furthermore, in relation to environmental protection, methods of warfare that cause long-term and severe damage to the natural environment are also prohibited (AP I, Article 35, paragraph 3).

Regarding means of warfare, the fundamental principle is the prohibition of unnecessary suffering,¹⁴ under which the use of weapons causing superfluous injury or unnecessary suffering is prohibited (AP I, Article 35, paragraph 2). Furthermore, in relation to the principle of military objectives (the principle of distinction), the use of weapons with indiscriminate effects is also prohibited.¹⁵ In relation to environmental protection, the use of means causing severe damage to the natural environment and environmental modification techniques is also prohibited (AP I, Article 35, paragraph 3, and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques). While rules regarding methods of warfare have been systematically refined in AP I and elsewhere, in the case of rules regarding means of warfare, there is often an approach of focusing on specific weapons and refining and regulating conditions through individual conventions.¹⁶

¹³ Crawford and Pert, *International Humanitarian Law*, p. 46. For examination of detailed principles regarding the principle of proportionality, see, for example, the following: Jeroen Van Den Boogaard, *Proportionality in International Humanitarian Law* (Cambridge: Cambridge University Press, 2023); Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law* (Oxford: Oxford University Press, 2021).

¹⁴ Arai Kyo, “Buryoku Funsoho [Law of Armed Conflict],” in *Kokusaiho (Dai 6 Han)* [International Law, 6th ed.] ed. Asada Masahiko (Tokyo: Toshindo [Toshindo Publishing], 2022), pp. 522–523.

¹⁵ UK LOAC Manual, para. 6.4; US LOW Manual, para. 6.4.1.

¹⁶ Weapons subject to regulation by such individual treaties include conventional weapons such as certain explosive, fulminating, and inflammable projectiles, dum-dum bullets, automatic submarine contact mines (naval mines), weapons using fragments undetectable by X-rays, land mines, booby traps, devices similar to land mines and booby traps, incendiary weapons, blinding laser weapons, and cluster munitions. Furthermore, among weapons of mass destruction, namely, nuclear weapons, biological weapons, and chemical weapons, prohibition by treaty has become the general approach, particularly for biological and chemical weapons. However, for nuclear weapons, while a treaty on the comprehensive prohibition thereof (the Treaty on the Prohibition of Nuclear Weapons) exists, many countries, including nuclear weapon states, are not yet parties thereto, and there is no globally applicable treaty relating to nuclear weapons that clearly prohibits their use.

Regarding protection of victims, etc., of armed conflict, the persons as subjects of protection include medical (sanitary) personnel, civil defense organization personnel, religious personnel, the wounded, the sick, the shipwrecked, prisoners of war, and civilians, and there are also certain obligations regarding treatment of the dead (Geneva Convention I of 1949 (hereinafter referred to as “Convention I”) Article 24, etc.). As for objects, they include medical units, medical buildings, material and stores, medical means of transport, buildings used for civil defense, civilian shelters, and cultural property (Convention I, Article 33, etc.). Additionally, objects and matters requiring special attention include works or installations containing dangerous forces, objects indispensable to the survival of the civilian population, and the natural environment (AP I, Article 56, etc.). Furthermore, systems for designating certain areas as specially protected zones and localities include hospital zones and hospital localities (Convention I, Article 23, Geneva Convention IV of 1949 (hereinafter referred to as “Convention IV”) Article 14), non-defended localities (AP I Article 59), and demilitarized zones (AP I, Article 60). Other provisions include combatant immunity (privilege), whereby combatants are exempt from prosecution for acts of direct participation in hostilities that comply with the law of armed conflict (AP I, Article 43, paragraph 2¹⁷), various rules concerning treatment of combatants, etc., as prisoners of war (Geneva Convention III of 1949 (hereinafter referred to as “Convention III”)), and in terms of protection of civilians, various rules concerning protection of enemy civilian nationals in the hands of a party to the conflict (Convention IV), which include rules concerning obligations of occupying powers called the law of occupation (Convention IV, Part III, Section III; Hague Regulations concerning the Laws and Customs of War on Land, Section III).

As described above, the law of engagement is broadly divided into two categories: rules regulating the methods and means of warfare based on the principle of military objectives and the prohibition of unnecessary suffering (the Hague Law) and rules concerning protection of victims, etc., of armed conflict (the Geneva Law). Therefore, when examining disinformation that may violate the law of engagement, it is necessary to do so in light of rules in both categories.

Furthermore, it should be noted that these various rules of the law of armed conflict have at their foundation two elements, military necessity and humanity, and that balancing these two elements is important in their interpretation and application.¹⁸

(2) *The Law of Neutrality*

Under the law of neutrality, which governs relations between belligerents and neutrals,¹⁹ while belligerents are obligated to respect the sovereign rights, etc., of neutral states (Convention concerning the Rights and Duties of Neutral Powers in Naval War, Article 1; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Article 1, etc.), neutral states bear obligations of prevention, abstention, and acquiescence.²⁰ However, under the

¹⁷ Regarding the basis in AP I for combatant immunity, Crawford and Pert explain that the concept is found in Article 43, paragraph 2. Crawford and Pert, *International Humanitarian Law*, p. 97.

¹⁸ UK LOAC Manual, paras. 2.2–2.4.3.

¹⁹ Stephen C. Neff, *The Rights and Duties of Neutrals* (Manchester: Manchester University Press, 2000), pp. 10–23.

²⁰ Shinobu, *Senji Kokusaiho Kogi*, vol. 4, pp. 208–209; Nicholas Tsagourias and Alasdair Morrison, *International Humanitarian Law*, 2nd ed. (Cambridge: Cambridge University Press, 2023) p. 233.

United Nations Charter, if the United Nations Security Council (UNSC) decides on enforcement measures concerning a breach of the peace, etc., UN member states are bound by such decisions²¹ and have no freedom to choose neutrality. Nevertheless, as demonstrated when the UNSC could not determine that Russia's invasion of Ukraine beginning February 24, 2022 constituted a breach of the peace due to Russia's veto, the UNSC cannot always determine the existence of a breach of the peace, etc., even when illegal use of force occurs. Moreover, even if the UNSC makes such a determination, it does not necessarily decide on related enforcement measures. In such cases, while third states other than parties to the conflict have no obligation to impose sanctions on states violating the principle of non-use of force or to assist the victim state, the prevailing view holds that it is not illegal to take discriminatory measures such as refusing to fulfill obligations as a neutral state toward the violating state, not recognizing its rights as a belligerent, and providing assistance to the victim state.²²

Based on the above, disinformation that may violate the law of armed conflict in relation to the law of neutrality would in theory mainly be that which infringes the interests of neutral states under the law of neutrality.

(3) The Law of Naval Warfare: Special Rules of the Law of Armed Conflict

The law of naval warfare constitutes special rules of the law of armed conflict. The law of naval warfare provides rules regarding methods and means of warfare specific to naval warfare,²³ including special (customary international law) rules regarding disinformation that recognize as a ruse of war the use of flags of neutral states (states not parties to the armed conflict), which is explicitly prohibited in AP I (Article 39, paragraph 1).²⁴ Such rules require attention when examining violations of the law of naval warfare from the use of disinformation and because of the relation to the interests of neutral states under the law of neutrality. Furthermore, rules governing the exercise of the right of maritime capture, including capture of contraband of war transported by neutral merchant vessels, are also specific to the law of naval warfare.²⁵ Therefore, while humanity and military necessity are cited as fundamental elements (of consideration) in the law of armed conflict, in the case of the law of naval warfare, the interests of neutral states are additionally cited.²⁶ Moreover, as one modification from traditional rules, particularly the law of neutrality, due to the establishment of the principle of non-use of force mentioned in Section 1

²¹ UN Charter Article 25.

²² International Law Association, *The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris*, Article 4; Ishimoto Yasuo, *Churitsu Seido no Shiteki Kenkyu* [A Study on the Historical Development of the Law on Neutrality] (Tokyo: Yuhikaku [Yuhikaku Publishing], 1958), pp. 221–223.

²³ International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter referred to as “SRM”) (New York: Cambridge University Press, 1995), pp. 73–186, 223–245.

²⁴ Tachi Sakutaro, *Senji Kokusaiho Ron* [International Law in Wartime] (Tokyo: Nippon Hyoron Sha [Nippon Hyoron Sha, Publishers], 1944), p. 384; Shinobu, *Senji Kokusaiho Kogi*, vol.3, p. 373.

²⁵ SRM, pp. 187–221. Article 22, paragraph 2 of Japan's Ship Act is based on the above-mentioned law of naval warfare rules concerning use of flags and exercise of the right of capture.

²⁶ International Institute of Humanitarian Law, *Kaijo Buryoku Funsoho San Remo Manyuaru Kaisetsusho* [San Remo Manual on International Law Applicable to Armed Conflicts at Sea: Commentary], trans. ed. Takemoto Masayuki (Tokyo: Toshindo [Toshindo Publishing], 1997), p. 4; Taoka Ryoichi, rev. Ogawa Yoshihiko, *Kokusaiho (Shinpan)* [International Law, New Edition] (Tokyo: Keiso Shobo [Keiso Shobo, Publishers], 1986), p. 255.

(2), the prevailing view holds that belligerent rights, such as visit and search and blockade against neutral vessels, are not recognized for states that violate the principle of non-use of force.²⁷ These points also require attention when seeking to understand the scope of the law of armed conflict relating to disinformation.

(4) Systems for Ensuring Compliance with the Law of Armed Conflict

To ensure compliance with the law of armed conflict, when an enemy belligerent violates the law of armed conflict, belligerents are permitted under the law of armed conflict (international law) to commit violations of the law of armed conflict as (wartime) reprisals to rectify such violations.²⁸ Other means of ensuring compliance include pursuing state responsibility through demands for reparations from the violating state and trying and punishing individuals who committed violations (war crimes) as criminals in domestic courts. Furthermore, the system of protecting powers, the International Fact-Finding Commission, and the system for punishing grave breaches introduced by the Geneva Conventions can also be said to be part of the systems for ensuring compliance with the law of armed conflict.²⁹

Understanding such systems for ensuring compliance with the law of armed conflict is considered essential for ensuring the diversity and appropriateness of countermeasures against enemy disinformation that violates the law of armed conflict. However, as mentioned in Section 2 (2), it should also be noted that (wartime) reprisals also constitute circumstances precluding wrongfulness.

2. Significance of Violations of the Law of Armed Conflict and Conditions that Constitute Violations

(1) Significance of Violations of the Law of Armed Conflict

Under domestic law, illegal acts are distinguished into two categories: torts under private law and crimes under criminal law.³⁰ In the case of torts under private law, the issue relates to the horizontal relationship between private individuals, namely the perpetrator and the victim, whereas in the case of crimes, the issue concerns the relationship between the perpetrator and the state as the upholder of the legal order.³¹

Meanwhile, the law of armed conflict is a field of international law, and international law is law whose primary purpose is to regulate relations between states (international relations) in the international community,³² where sovereign states coexist. In other words, it is law that regulates horizontal relationships between legal subjects and has a function corresponding (or similar) to

²⁷ International Law Association, *The Budapest Resolutions*, Article 4(a).

²⁸ David Turns, "Implementation of International Humanitarian Law," in *The Oxford Guide to International Humanitarian Law*, ed. Ben Saul and Dapo Akande (Oxford: Oxford University Press, 2020), p. 366. It should be noted that since armed reprisals in peacetime are no longer permitted due to the principle of non-use of force, peacetime reprisals are called "countermeasures" today. Iwasawa, *Kokusaiho*, pp. 586–587.

²⁹ Arai, "Buryoku Funsoho," pp. 533–534.

³⁰ Tabata Shigejiro, *Kokusaiho Shinko Ge* [New Lecture on International Law, vol. 2] (Tokyo: Toshindo [Toshindo Publishing], 1991), p. 3.

³¹ Ibid.

³² Malcolm N. Shaw, *International Law*, 9th ed. (Cambridge: Cambridge University Press, 2021), p. 2; Asada, *Kokusaiho*, p. 4.

private law under domestic law.³³ Therefore, illegal acts under international law, namely violations of international law, are understood to be similar not to crimes under domestic law but to torts under private law, and are treated as such in state practice. Consequently, although responsibility for violations of international law naturally lies with the state, it can be said that the nature of state (international) responsibility as the effect of such violations is akin not to criminal responsibility under domestic law but to civil responsibility, that is, responsibility under private law. Indeed, the obligation of reparation that arises as the effect of violations of international law is, in terms of content, akin to measures for discharge of responsibility under private law, such as restitution and compensation for damages.³⁴ Furthermore, satisfaction exists as a form of reparation, with forms including apologies, acknowledgment of the violation by the violating state, investigation of the incident, and punishment of those responsible. And it should be noted that even if the offending state does not apologize, a declaration of the illegality of the offending state's conduct by an international court (tribunal) can also constitute satisfaction.³⁵

When the dispatch of disinformation violates the law of armed conflict, given that the law of armed conflict is a field of international law, the legal nature of such violations and specific demands for pursuing responsibility against the enemy state for the violations would be as described above. On the other hand, it should be noted that, as mentioned in Section 1 (4), criminal responsibility for acts by the enemy that violate the law of armed conflict is in principle pursued through application of one's own criminal law on the perpetrator, taking into account principles of the scope of application of one's own criminal law (such as territoriality and nationality) and principles under international law regarding the exercise of jurisdiction for infringements of one's own criminal law.³⁶

(2) Conditions that Constitute Violations of the Law of Armed Conflict

Acts that may constitute violations of the law of armed conflict are acts by state parties to armed conflicts that violate the various obligations and prohibition principles explained in Section 1. Therefore, in order for the dispatch of disinformation to constitute a violation of the law of armed conflict, the basic premise is that such disinformation is dispatched by (the organs³⁷ of) a state party to the armed conflict. Furthermore, in order for the dispatch of disinformation to be assessed as a violation of the law of armed conflict, not only must such dispatch be an act that violates rules under the law of armed conflict, but it must also theoretically not fall under circumstances precluding wrongfulness such as (wartime) reprisals as mentioned in Section 1 (4).

³³ Tabata, *Kokusaiho Shinko Ge*, p. 4.

³⁴ Ibid., p. 62.

³⁵ For example, in the Corfu Channel Case, the International Court of Justice declared that minesweeping in Albanian territorial waters by British warships constituted a violation of Albanian sovereignty, and that such a declaration was "in itself appropriate satisfaction." International Court of Justice, *The Corfu Channel Case*, Judgment of 9 April 1949, p. 35.

³⁶ Regarding the exercise of jurisdiction by the International Criminal Court, the principle of complementarity is adopted, which respects the jurisdiction of domestic courts and positions the International Criminal Court as complementing them. Rome Statute of the International Criminal Court, Preamble paragraph 10 and Article 1.

³⁷ Since belligerent groups based on the system of belligerent recognition can also be a party to armed conflicts, it would be more accurate to describe them as "parties" to armed conflicts, but for convenience, this paper will describe them here as "state parties to armed conflicts, including belligerent groups." It should be noted that "organs" of legal subjects means natural persons or organized bodies that can act for legal subjects.

And it should be noted that while violations of territorial sovereignty may not cause tangible (physical) damage to other states, for pollution of another state's territory to be assessed as an illegal act under international law, that is, a violation of international law, the occurrence of damage from the pollution is required. Thus, there are cases where a violation of international law is established solely by an act of a state (a subject of international law) without the occurrence of damage (an illegal result), and cases where the occurrence of damage is a condition for the establishment of a violation of international law. And whether the occurrence of damage is necessary for establishing a violation of international law depends on the content of the international obligation.³⁸ Therefore, when a type of violation of the law of armed conflict presupposes the occurrence of an illegal result (harm or damage), such as death of civilians (AP I Article 85, paragraph 3, chapeau and subparagraph (a)), in order for the dispatch of disinformation to be assessed as such a violation of the law of armed conflict, it is necessary for the disinformation to have caused such an illegal result.

Furthermore, for an act to be said to have caused an illegal result, a certain causal relationship (causation) is required between the act and the result that occurred. This is a general principle condition of criminal law common to both criminal law in Common Law (Anglo-American law) and criminal law in Civil Law, and it is also a common principle that the degree of such a causal relationship, that is, the condition for causation to constitute a legal causal relationship, must be direct causation based on a conditional relationship ("but for"), meaning that if the act had not occurred, the result would not have occurred either.³⁹ Furthermore, the necessity of a legal causal relationship between an act and an illegal result is a condition not only for criminal law but also for civil law,⁴⁰ that is, for establishment of torts under private law, and can therefore be said to be a condition for illegality and tort common to both criminal law and private law. Since international law is law with a function corresponding (similar) to private law under domestic law, when the occurrence of an illegal result (damage or harm) is a condition for a violation of international law, a legal causal relationship is also required between the act under international law and the illegal result. Therefore, since the law of armed conflict is also a field of international law, in order for the dispatch of disinformation during armed conflict to constitute a violation of rules under the law of armed conflict concerning the occurrence of illegal results (damage or harm), a legal causal relationship between such disinformation and the illegal result (damage or harm) is necessary.

(3) Differences between Violations of the Law of Armed Conflict and Ethical Violations (Differences between Legality and Ethical Acceptability)

The justice aimed for by the law is, as symbolized by the scales held by the goddess of justice (Justitia), correctness in the sense of fairness (equity) of opposing interests, not correctness as goodness. The various rules of the law of armed conflict are also standards for the presence or absence of legal responsibility that are inherently the result of balancing the opposing interests of military necessity and humanity, and are not standards for ethical judgment of good and evil. Therefore, in

³⁸ Iwasawa, *Kokusaiho*, p. 569.

³⁹ Nishida Noriyuki, *Keiho Soron (Dai 2 Han)* [General Part of Criminal Law, 2nd ed.] (Tokyo: Kobundo [Kobundo, Publishers], 2010), p. 93; Andrew Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford: Oxford University Press, 2009), p. 103.

⁴⁰ Uchida Takashi, *Minpo II (Dai 3 Han)* [Civil Law II, 3rd ed.] (Tokyo: Tokyo Daigaku Shuppankai [University of Tokyo Press], 2011), pp. 385–404.

the case that a dispatch of disinformation does not violate the law of armed conflict, even though this means that legal responsibility under the law of armed conflict (such as compensation) will not be pursued for said dispatch,⁴¹ it does not necessarily mean that said dispatch is ethically acceptable.⁴² Hence, when judging the acceptability of dispatching disinformation during armed conflict, it should be noted that consideration of its legality under the law of armed conflict alone may not be sufficient.

3. Examples of Disinformation during Armed Conflicts

The types of disinformation dispatched during armed conflicts are surely wide-ranging. Among the disinformation or information suspected to be disinformation confirmed from literature, etc., related to incidents from world wars and armed conflicts, examples, categorized by purpose, that may be useful for examining dispatches of disinformation violating the law of armed conflict are below.

(1) Propaganda about Illegal Acts by Enemy Countries and Enemy Forces

There have been frequent instances during wartime and armed conflicts of authorities intentionally dispatching disinformation aimed at spreading the impression that enemy countries and enemy forces are violating the law of engagement. For example, Kiyoshi Karl Kawakami describes a French journalist's confession that during World War I, French authorities created wooden models of severed heads and other objects, photographed them, and disseminated the photographs worldwide as evidence of enemy cruelty. He also describes the London Daily Mirror's reprinting, on December 15, 1915, of a photograph that appeared in a German newspaper but with the headline changed so as to suggest that it depicted a scene of abuse by German forces.⁴³ Furthermore, Kawakami introduces a case concerning the incident on August 15, 1937,⁴⁴ during the armed conflict between Japan and China, when Chinese military aircraft bombed the Cathay Hotel and Palace Hotel in the Shanghai International Settlement. Although Chinese authorities reported that the bombers were Japanese military aircraft, after the Washington Post's Shanghai correspondent determined that the bombers were Chinese military aircraft, the Chinese authorities corrected their earlier report.⁴⁵ In addition, in another incident approximately one week later on August 22, when

⁴¹ Hans Kelsen, *Law and Peace in International Relations* (New York: William S. Hein & Co., Inc., 1997), pp. 23–26.

⁴² Fields that examine ethics as a legitimacy element in addition to legality under the law of armed conflict include, for example, lethal autonomous weapons systems (LAWS). For an ethical examination of LAWS, see, for example, the following: Iwamoto Seigo, "AI Robotto Heiki to Kokusaiho Kisei no Hokosei" [AI Robot Weapons and the Direction of International Law Regulation], in Serita Kentaro et al., eds., *Jissho no Kokusai Hogaku no Keisho: Ando Nisuke Sensei Tsuito* [Inheritance of the Positivist Researches of International Law: in Memory of Professor Nisuke Ando] (Tokyo: Shinzansha [Shinzansha, Publishers], 2019), pp. 868–869.

⁴³ K. Karl Kawakami, *Shina Tairiku no Shinso* [Japan in China: Her Motives and Aims], trans. Fukui Yuzo (Tokyo: Keiei Kagaku Shuppan [Keiei Kagaku Publishing], 2022), pp. 268–269.

⁴⁴ War, under international law, is a legal state established by an express manifestation of *animus belligerendi*, such as a declaration of war by one of the parties, or a tacit manifestation of *animus belligerendi* (Tabata, *Kokusaiho Shinko Ge*, pp. 184, 243–245). The state of war between Japan and China arose under international law on December 9, 1941, from China's (the Chongqing government's) declaration of war against Japan. This point is also indicated in Article 4 of the Treaty of Peace between Japan and the Republic of China, which confirmed the end of the state of war between Japan and China.

⁴⁵ Kawakami, *Shina Tairiku no Shinso*, p. 270.

Chinese military aircraft again bombed the International Settlement in Shanghai and damaged a department store, although Chinese authorities announced that the bombing was by Japanese military aircraft, Kawakami describes a special dispatch of the New York Times from Hong Kong dated September 6 reporting that there was evidence indicating the incident was caused by Chinese military aircraft.⁴⁶

(2) Deception of Enemy Countries and Enemy Forces and Lowering Their Morale

With regard to the dispatch of disinformation by national authorities during World War II, this was conducted by the Political Warfare Executive in the United Kingdom and by the Morale Operations Section of the Office of Strategic Services in the United States.⁴⁷ Dispatches by both agencies included disinformation aimed at deceiving the enemy and lowering enemy morale, for example, purporting that the German forces' landing operation on the eastern coast of Britain in the fall of 1940 was thwarted by British secret weapons. This disinformation is said to have been extremely effective.⁴⁸ Furthermore, disinformation by the United States included one that targeted only specific enemy forces,⁴⁹ such as disinformation targeting only German forces deployed in Italy with content stating that Italian forces were printing their own surrender leaflets because those scattered by Allied aircraft were insufficient. However, there was also disinformation aimed at inflicting psychological distress on all enemy nationals, such as disinformation that those exposed to Allied bombing would become infertile.⁵⁰

(3) Concealment and Justification of Illegal Acts by One's Own Country and Forces

As explained in Section 1 (1), civilian hospitals are protected objects under the law of engagement, and Convention IV (Article 18) provides that civilian hospitals may in no circumstances be the object of attack, but shall at all times be respected and protected by parties to armed conflicts. Israel is a party to this Convention, but claimed that there was a command center of the Islamist organization Hamas under Al-Shifa Hospital in Gaza City, Palestine (Autonomous Region), and on November 15, 2023, Israeli forces stormed the hospital⁵¹ and released a video claiming to have recovered weapons and ammunition from inside.⁵² However, it should be noted that Convention IV provides that even for civilian hospitals, their protection may cease if they commit acts harmful to the enemy outside their humanitarian duties, but that such protection ceases only after due warning with a reasonable time limit has been issued and such warning has remained unheeded (Article 19). Regarding this point, Israel claimed that on the day before the operation (November 14), it "conveyed to the relevant authorities in Gaza once again that all military activities within the

⁴⁶ Ibid., pp. 270–271.

⁴⁷ Paul Fussell, *Wartime* (Oxford: Oxford University Press, 1990) pp. 45–46.

⁴⁸ Ibid., p. 47.

⁴⁹ Ibid., p. 46.

⁵⁰ Ibid.

⁵¹ *Yomiuri Shimbun* [Yomiuri Newspaper], evening edition, November 15, 2023.

⁵² Nidal Al-Mughrabi, "Hamas command center, weapons found at Gaza hospital, Israeli military says," November 15, 2023, Reuters, last updated November 16, 2023, <https://www.reuters.com/world/middle-east/israel-raids-gazas-al-shifa-hospital-2023-11-15/>; *Yomiuri Shimbun* [Yomiuri Newspaper], evening edition, November 16, 2023. Regarding the nature of the Israel-Hamas (Palestine) conflict under international law, see footnote 5 above.

hospital must cease within 12 hours. Unfortunately, it did not.”⁵³ On the other hand, Hamas denied military use of the hospital, and according to Reuters, Hamas issued a statement on November 15 condemning both Israel and the United States as responsible for storming the hospital.⁵⁴ It also claimed that Israeli forces beat many patients and medical personnel inside the hospital and forced them to undress.⁵⁵ The claims of both parties to the conflict regarding Hamas’s use of the hospital are diametrically opposed, meaning one claim is surely false, that is to say, it is disinformation. However, the truth is unknown because neutral and fair fact-finding by a third party regarding this matter has not been recognized at the time of writing this thesis (end of July 2024). And it should be noted that in terms of the details, there is also the possibility that disinformation was included in the claims of both sides.

(4) Boosting the Morale of One’s Own Country and Forces

During armed conflicts, authorities may also dispatch disinformation about their own forces to boost morale. For example, on December 10, 1941, immediately after the Japanese Navy’s attack on Pearl Harbor, in regard to a B-17 bomber that attacked the light cruiser Natori and was subsequently shot down by Japanese military aircraft, authorities of the United States announced that the aircraft had rammed the battleship Haruna.⁵⁶

As another example, an official of the Ukrainian government (advisor to the Ministry of Internal Affairs of Ukraine) released an audio recording on February 24, 2022, purporting to be a recording of Ukrainian border guards on Zmiinyi Island in the Black Sea refusing a warning to surrender from Russian forces (a warship), and the Ukrainian president issued a statement that the border guards who did not surrender but continued to fight until the end and sacrificed their lives for their homeland would be awarded the title “Hero of Ukraine.”⁵⁷ However, Business Insider reporter Erin Snodgrass reported, based on information from the Ukrainian Navy, that the 13 border guards resisted two Russian attacks but were ultimately forced to surrender due to ammunition shortages and are currently detained in Sevastopol.⁵⁸ Furthermore, the day after Russia’s invasion of Ukraine began, Ukrainian media began reporting on an unnamed pilot of a Ukrainian Air Force MIG-29 who shot down six enemy aircraft in 30 hours, and the Ukrainian government also spread the story of this unnamed pilot on Twitter (now X) on February 27.⁵⁹ However, approximately one month later, the Ukrainian Air Force Commander announced on Facebook that this rumor of an unnamed pilot, which had been spread by the Ukrainian authorities themselves, was a “superhero-legend whose character was created by Ukrainians.”⁶⁰

⁵³ *Nikkei Shimbun* [Nikkei Newspaper], evening edition, November 15, 2023.

⁵⁴ *Ibid.*

⁵⁵ *Asahi Shimbun* [Asahi Newspaper], evening edition, November 16, 2023.

⁵⁶ Fussell, *Wartime*, pp. 35–36.

⁵⁷ Charles R. Davis and Kieran Corcoran, “Ukraine troops on Zmiinyi Island who reportedly told Russian warships ‘go fuck yourself’ now reported alive,” *Business Insider*, last updated February 25, 2022, <https://www.businessinsider.com/ukrainian-border-guards-on-zmiinyi-island-died-as-heroes-zelensky-says-2022-2>.

⁵⁸ *Ibid.*

⁵⁹ Emma Bubola, “Ukraine acknowledges that the ‘Ghost of Kyiv’ is a myth,” *New York Times*, last updated May 1, 2022, <https://www.nytimes.com/2022/05/01/world/europe/ghost-kyiv-ukraine-myth.html>.

⁶⁰ *Ibid.*

4. Disinformation that May Constitute Violations of the Law of Armed Conflict

As introduced in Section 3, wide-ranging examples of disinformation and information dispatches that appear to be disinformation during armed conflicts can be confirmed. Some of these, such as those in Section 3 (4), would likely be problematic under domestic law but not under international law. And disinformation including unjust infringement of the interests of neutral states such as Section 3 (1) and disinformation about attacks that constitute violations of the law of engagement by enemy countries, such as Sections 3 (1), as well as disinformation aimed at inflicting harm on enemy countries, including the mental suffering of enemy civilians, as in the examples in Section 3 (2), can also be confirmed.

Therefore, based on Sections 1 and 2 and the examples in Section 3 mentioned above, when examining which dispatches of disinformation constitute violations of the law of armed conflict, one issue may be what dispatch of disinformation corresponds to illegal attacks, particularly whether mental suffering has been inflicted on enemy civilians through disinformation constitutes illegal attacks. However, since disinformation lacks physical coercive force and merely influences human cognition, the preliminary issue would be whether disinformation can constitute an attack in the first place. Furthermore, as derivative issues, questions arise such as whether the dispatch of disinformation aimed at luring civilians into danger constitutes an attack, whether the dispatch of disinformation aimed at inducing harm by third parties constitutes an attack, whether loss of utility of objects through disinformation is possible and, if so, whether this can constitute an attack. These issues are analyzed and examined below.

(1) Whether Disinformation Constitutes an Attack

As explained in Section 1 (1), if disinformation constitutes an attack against persons or objects other than military objectives, its dispatch may violate the law of engagement (the Hague Law). However, this raises the issue of whether disinformation that lacks physical force and merely influences human cognition constitutes an attack or, more specifically, the definition and concept of “attack” under the law of engagement.

AP I defines “attacks” as “acts of violence against the adversary, whether in offense or in defense” (Article 49), and according to this definition, non-violent acts do not constitute attacks. Based on this, the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (hereinafter referred to as “Tallinn Manual 2.0”) also states that “non-violent operations, such as psychological cyber operations and cyber espionage, do not qualify as attacks,”⁶¹ and defines cyber operations that are “reasonably expected to cause injury or death to persons or damage or destruction to objects”⁶² as cyber-attacks. In the light of such definitions and concepts, since disinformation merely influences human cognition and does not itself cause death or injury to persons or damage to objects, as Eian Katz, Legal Counsel of the American Bar Association Center for Human Rights, points out, disinformation is in principle unlikely to be labeled an

⁶¹ Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University press, 2017), p. 415.

⁶² *Ibid.*, p. 415 (Rule 92).

attack under the law of engagement or other physically violent act.⁶³ Furthermore, Michael Bothe and others also point out that the concept of attack does not include non-physical means such as dissemination of propaganda or psychological warfare.⁶⁴ Based on the above, unless there are special circumstances as exemplified in Section 4 (2), it can be said that disinformation does not generally constitute an attack under the law of engagement.

(2) Dispatch of Disinformation Aimed at Luring Civilians into Danger

Even if disinformation does not constitute an attack, would the use of disinformation in an attempt to lure enemy civilians trying to escape hostilities into minefields, etc., where death or injury would be virtually certain, with the intent to kill or injure these civilians, not be assessed as a violation of the law of engagement? Regarding this point, Tilman Rodenhäuser, Legal Adviser of the International Committee of the Red Cross, cites that the Norwegian Manual of the Law of Armed Conflict considers,⁶⁵ in the context of information operations and the notion of attack, the dissemination of information intended to mislead civilians and cause them injury as an example of illegal psychological warfare, and suggests that the dispatch of disinformation as described above may be interpreted as illegal under the law of armed conflict. At the same time, Rodenhäuser notes that very few states or experts have expressed views on whether information operations that can be expected to lead to human injury or death or damage to objects can be considered attacks, and points out that the crux of this matter from a legal perspective is whether it can be said that the link between an information operation and the resulting harm can be sufficiently direct to be considered an attack.⁶⁶ However, Rodenhäuser also himself does not clearly answer whether information operations that can be expected to lead to human death constitute attacks.

As explained in Sections 4 (1) and 2 (2), in order for an act to be legally said to have caused an illegal result, direct causation, that is, a legal causal relationship, between the act and the illegal result is required. Based on this, even if civilians who entered a minefield under the influence of disinformation aimed at luring civilians into minefields were killed or injured, unless there are special circumstances, whereby any ordinary person with common sense who encountered such disinformation in such a situation would almost certainly be expected to enter the minefield, it is difficult to say that there exists a legal causal relationship that serves as the condition for the establishment of an illegal act. In other words, it is difficult to say that there exists a conditional relationship between the disinformation and the harm, whereby if such disinformation had not existed, the death or injury of civilians or the danger thereof would not have occurred, that would be of the same nature as the conditional relationship between a direct act of physical violence and the resulting death or injury. Therefore, even if a dispatch of disinformation is aimed at luring

⁶³ Eian Katz, "Liar's War: Protecting civilians from disinformation during armed conflict," *International Review of the Red Cross*, vol. 102, no. 659 (2020), pp. 669–670. Furthermore, Katz points out that from examining the cases of Myanmar, Rwanda, and Syria, while disinformation in armed conflict is often a cause of violent acts, the inability to attribute responsibility for the harm from such violent acts to the publishers of the disinformation makes it unlikely that disinformation itself would be treated as an attack or other act of physical violence under international humanitarian law. Katz, "Liar's War," pp. 669–670.

⁶⁴ Michael Bothe et al., *New Rules for Victims of Armed Conflicts*, 2nd ed. (Leiden: Martinus Nijhoff, 2013), para. 329.

⁶⁵ Tilman Rodenhäuser, "The Legal Boundaries of (Digital) Information or Psychological Operations Under International Humanitarian Law," *International Law Studies*, vol. 100 (2023), p. 569.

⁶⁶ *Ibid.*

civilians into the danger of death or injury, unless there are special circumstances as described above, it would generally be difficult to say that it corresponds to an attack against civilians. Consequently, focusing on this point, it may seem that dispatching such disinformation does not violate the rules regulating the methods and means of warfare (the Hague Law), and in that sense does not constitute a violation of the law of engagement.

However, as indicated in Section 1 (1), the law of engagement also includes rules concerning protection of victims, etc., of armed conflict (the Geneva Law), and under these rules, civilians enjoy general protection against dangers arising from military operations (API, Article 51, paragraph 1), and their lives must be respected (Hague Regulations concerning the Laws and Customs of War on Land, Article 46). And given that belligerents have such obligations of protection and respect, the dispatch of disinformation itself when it is intended to lure civilians into danger and may lead to such results can be interpreted as conflicting with the above obligations (violation of the Geneva Law). Therefore, in this respect, dispatching such disinformation may constitute a violation of the law of engagement.

(3) Dispatch of Disinformation Aimed at Inducing Harm by Third Parties

Even if disinformation itself does not constitute a direct attack, it might seem that providing third parties with motivation to harm civilians through disinformation and thereby exposing civilians to the danger of harm (violent acts) by such third parties would constitute indirectly inflicting an attack. Regarding this point, Katz points out that because it is difficult to say there is a primary causal relationship between the disinformation itself that merely supplies or reinforces motivation without involving direction or coercion to commit criminal acts, and the harm to civilians caused by third parties induced by such disinformation, if such disinformation merely supplies motivation, not only does its dispatch not constitute harm but it is also insufficient as indirect harm.⁶⁷ As explained in Section 2 (2), considering that the legal causal relationship between an act and an illegal result, which is one of the conditions for the establishment of an illegal act, is not merely a causal chain of events, like in the Japanese proverb saying “when the wind blows, the barrel makers prosper,” but is direct causation based on a conditional relationship, it may be considered that Katz’s point is a valid one.

However, even if dispatching disinformation that merely supplies motivation for harm to third parties does not constitute indirect harm, it may seem to constitute the illegal act of incitement to harm (violent acts).⁶⁸ Regarding this point, Katz states that for incitement to be established, in addition to the “intent” to cause third parties to commit acts, the “likelihood” that third parties will proceed to commit acts as a result of such incitement is also required, but disinformation in the form of libelous accusations against individuals or groups, no matter how provocative, does not reach the level of “likelihood” that satisfies the conditions for incitement.⁶⁹ Furthermore, the Rome Statute of the International Criminal Court, which designates “incitement” to commit genocide a crime, also requires that such incitement be made “directly and publicly” (emphasis added by the author; Article 25, paragraph 3 (e)). Based on the above, it can be understood that the dispatch of

⁶⁷ Katz, “Liar’s War,” p. 670.

⁶⁸ Incitement (as a crime) is a special category of criminal participation that enables the punishment of acts that do not constitute complicity, such as instigation or aiding and abetting, or indirect harm.

⁶⁹ Katz, “Liar’s War,” p. 671.

disinformation alone (such as “XX ethnic group is dangerous”), even if it may increase the danger of harm (violent acts) against civilians, does not constitute incitement to such harm (violent acts). Katz draws a similar conclusion.⁷⁰

(4) Loss of Utility of Objects through Disinformation

As explained in Section 1 (1), targeting civilian objects for attack is prohibited under the law of engagement. Furthermore, as explained in Section 4 (1), attacks against civilian objects under the law of engagement mean acts that lead to damage or destruction of objects, but damage to objects is not limited to physical harm and can be interpreted as also including the reduction of the function or utility of objects. Indeed, France explains that when an object targeted by cyber operations can no longer be used for its intended purpose as a result of such operations, regardless of whether there is physical harm to the object, said cyber operations constitute an attack.⁷¹ If it is valid to consider actions that reduce the function or utility of objects to be part of attacks that lead to damage to objects, for example, if an enemy country dispatches disinformation that supplies such as food and medicine distributed as humanitarian assistance to civilians during armed conflicts are contaminated with toxic substances, and these civilians have doubts about the safety of the supplies due to the disinformation but lack the means or methods to verify their safety, they cannot consume the food, and in that sense the food loses its utility in substance, and in this respect, the disinformation can seemingly be interpreted as being equivalent to an attack on that food.

However, when the function or utility of an object is reduced by cyber operations, the function or utility of the object is objectively reduced, whereas in the case of food and other items that are misperceived by civilians as being contaminated through disinformation, their utility is not objectively lost or reduced. That is, the harm from such disinformation is subjective, not objective. In this respect, the content and nature of the harm from the above-mentioned cyber operations and the harm from disinformation are decisively different. In that sense, it seems legally difficult to say that creating the perception that food and other items are contaminated through disinformation constitutes attacks prohibited under AP I against objects indispensable to the survival of the civilian population such as foodstuffs (Article 54, paragraph 2) or against civilian objects (Article 52, paragraph 1).

However, as Katz also points out, disinformation that causes civilians to hesitate to consume food and other items by unjustly raising doubts about the safety of supplies such as food and water in situations where there are no means of verification, even if it does not constitute an attack against such supplies, can be said to effectively render such supplies useless.⁷² Therefore, dispatching such disinformation, in situations where civilians are forced to depend on supplies such as food for their survival, may conflict with the prohibition of starvation of civilians as a method of warfare (AP I, Article 54, paragraph 1) (and violate the Hague Law)⁷³.

⁷⁰ Ibid., p. 672.

⁷¹ Ministère des Armées, *Droit international appliqué aux opérations dans le cyberspace*, September 19, 2019, p. 13.

⁷² Katz, “Liar’s War,” p. 677.

⁷³ On the prohibition of starvation of civilians as a method of warfare, see, for example, the following: Arai Kyo, “The starvation of civilians as a method of warfare: its prohibition and war criminalization,” *Doshisha hogaku* [The Doshisha law review], vol. 72, no.7 (February 2021), pp. 169–213.

Katz also points out that when disinformation during armed conflict is considered to have “willfully impeded relief supplies,” its dispatch may constitute the war crime of “starvation of civilians as a method of warfare” (Rome Statute of the International Criminal Court, Article 8, paragraph 2(b)(xxv)), for which attack is not a prerequisite.⁷⁴

(5) Mental Suffering through Disinformation

As explained in Section 4 (1), Tallinn Manual 2.0 defines that under the law of armed conflict, operations that are reasonably expected to cause injury or death to persons constitute attacks, but it also states that, in the light of humanity (humanitarian purposes), which is one of the fundamental elements of the law of armed conflict (as mentioned in Section 1 (1)), it is reasonable to extend the definition of the attack to severe mental suffering that is tantamount to injury to individuals.⁷⁵ Indeed, under Japanese criminal law, injury to persons is also interpreted as being possible through intangible means,⁷⁶ and in the light of this point and the above-mentioned concept, if mental suffering is inflicted on enemy civilians through disinformation during armed conflict, dispatching such disinformation could seem to constitute injury to civilians and correspond to an attack against civilians. However, under Japanese criminal law as well, the prevailing view is that injury to persons is an infliction on physiological function in the sense of causing an adverse change to the health of the human body.⁷⁷ Furthermore, regarding whether inflicting mental suffering constitutes injury, in precedents of Japan’s Supreme Court as well, only instances of the continuous manifestation of distinctive mental symptoms, as required by medical judgment criteria, not merely the feeling of temporary mental suffering or stress, are considered to constitute injury.⁷⁸ That being the case, for it to be said that persons were injured through disinformation, the mere inflicting of mental suffering through disinformation is insufficient, and it is considered that harm sufficient to cause mental disorders is necessary. However, even if it is possible to inflict severe mental suffering through intangible acts such as threats to kill, it is difficult to imagine disinformation being able to inflict harm that is sufficient to cause mental disorders, and no such examples can be confirmed. Therefore, even if mental suffering is inflicted on civilians through disinformation, it is generally difficult to consider it as constituting an attack against civilians.

Nevertheless, as already mentioned, parties to armed conflicts under the law of engagement have an obligation to protect persons entitled to protection under the Geneva Conventions, such as prisoners of war and civilians (Convention I, Article 12; Convention II, Article 12; Convention III, Article 13; Convention IV, Article 16; AP I, Article 10), and inflicting mental torture when seeking to secure information from prisoners of war is also explicitly prohibited (Convention III,

⁷⁴ Katz, “Liar’s War,” p. 679.

⁷⁵ *Tallinn Manual 2.0*, p. 417.

⁷⁶ For example, in Japan, there was a case in which the act of continuing to play radio sounds and alarm clock sounds from one’s home toward a victim living next door, causing mental stress to the victim and resulting in chronic headaches, sleep disorders, etc., was treated as the crime of injury. Maeda Masahide, ed., *Jokai Keiho (Dai 4 Han)* [Commentary on the Criminal Code, 4th ed.] (Tokyo: Kobundo [Kobundo, Publishers], 2020), p. 617.

⁷⁷ Yamaguchi Atsushi, *Keiho Kakuron (Dai 3 Han)* [Specific Offences of Criminal Law, 3rd ed.] (Tokyo: Yuhikaku [Yuhikaku Publishing], 2024), p. 45; Nishida Noriyuki, *Keiho Kakuron (Dai 5 Han)* [Specific Provisions of Criminal Law, 5th ed.] (Tokyo: Kobundo [Kobundo, Publishers], 2010), p. 41.

⁷⁸ Supreme Court Decision, July 24, 2012, Saiko Saibansho Keiji Hanreishu [Supreme Court Criminal Case Reports], vol. 68, no. 8, p. 709; Maeda, *Jokai Keiho*, p. 616.

Article 17). Therefore, while it may be difficult to say that inflicting mental suffering on civilians through disinformation constitutes an attack against civilians (violation of the Hague Law), it may constitute a violation of the law of engagement (the Geneva Law) in that it may conflict with the above-mentioned obligation of protection. Katz also points out that while it would likely be inappropriate to charge perpetrators of disinformation operations on the grounds of crimes such as killing or bodily injury from the perspective of causation, it may be possible to impose responsibility on the grounds of intentionally causing great suffering to the health of civilians as stated in the Rome Statute of the International Criminal Court, Article 8, paragraph 2(a)(iii).⁷⁹

(6) Summary

In summary, since disinformation is an action that influences human cognition and is not in itself an act of violence that causes death or injury to persons, unless there are special circumstances as shown in the example in Section 4 (2), it is difficult to interpret disinformation as constituting an attack under the law of engagement. This is also true for disinformation that inflicts mental suffering. Since injury under criminal law in the sense of infliction on physiological function of persons by disinformation is not considered possible, it is also generally difficult to conclude that the dispatching of such disinformation constitutes an attack under the law of engagement. However, in the case of disinformation that misleads and deceives civilians into thinking that objects indispensable to their survival have no utility, that is, disinformation that causes civilians to hesitate to consume food and other items by unjustly raising doubts about the safety of supplies such as food and water, for example, in situations where such food or water are the civilians' only means of survival, but they have no means to verify its safety, the dispatch of such disinformation may conflict with the prohibition of starvation of civilians as a method of warfare, and while not constituting an attack, may violate rules concerning methods of warfare in the law of engagement (the Hague Law).

Furthermore, it is also generally difficult to consider the dispatch of disinformation aimed at luring protected persons into danger and disinformation aimed at inflicting mental suffering on protected persons, as illegal attacks under the rules regulating the methods and means of warfare (the Hague Law), but it may conflict with rules concerning protection of victims, etc., of armed conflict (the Geneva Law). This may be a manifestation of the fact that since disinformation merely influences human cognition, violations of the law of armed conflict through disinformation are difficult to establish unless they are crimes based solely on the act.

Based on the above, it is concluded that although violations of the law of armed conflict by dispatching disinformation that target enemy civilians in particular would mainly consist of violations of rules concerning the protection of victims, etc., of armed conflict under the law of engagement (the Geneva Law), in some cases, the dispatch of disinformation concerning the loss of utility of objects may also constitute violations of the law of armed conflict as the breach of rules regulating the methods and means of warfare (the Hague Law).

⁷⁹ Katz, "Liar's War," p. 681.

Conclusion: Points Requiring Attention from a Legal (International Law) Perspective regarding Responses to Disinformation during Armed Conflicts

Based on the examples introduced in Section 3, disinformation from enemy countries during armed conflicts is likely to take various forms. Therefore, methods of countering such disinformation will also be varied, but when the dispatch of disinformation violates the law of armed conflict, as stated in Section 2 (1), it becomes possible to take legal countermeasures such as pursuing responsibility for the enemy country's violations of international law, in other words, pursuing the state responsibility of the enemy country through demands such as compensation for damages.

Therefore, to appropriately respond to disinformation from enemy countries during armed conflicts, it is first necessary to accurately distinguish between legal and illegal dispatches of disinformation in the light of the law of armed conflict, and for this purpose, it would be essential to comprehensively grasp the content of the law of armed conflict described in Section 1, particularly the content of the law of engagement, including special rules such as the law of naval warfare that permits the use of flags of neutral states as disinformation constituting ruses of war. Additionally, it would also be essential to be thoroughly familiar with the nature and conditions of violations of the law of armed conflict (illegal acts under international law) described in Section 2, as well as to understand the issues under the law of armed conflict concerning disinformation and the analysis and examination thereof described in Section 4.

Furthermore, to take appropriate legal countermeasures, in addition to the above understanding, it would also be necessary to grasp the systems for ensuring compliance with the law of armed conflict described in Section 1 (4) and the legal countermeasures described in Section 2 (1).

And it should be noted that, as stated in Section 2 (1), because criminal responsibility for acts by the enemy that violate the law of armed conflict is fundamentally pursued through application of one's own criminal law to the perpetrator, the determination of which crimes the dispatch of disinformation may constitute under one's own criminal law would require a separate examination from a criminal law perspective.

In addition, as stated in Section 2 (3), the legality of dispatching disinformation and its ethical acceptability are separate issues, and theoretically, the two do not necessarily coincide. Therefore, regarding one's own country's dispatch of disinformation that is legal under the law of armed conflict, the distinction between illegality and ethical violations described in Section 2 (3) is essential for pointing out the theoretical flaws of criticisms from enemy countries that equate illegality with ethical violations and for countering the criticisms. For this purpose as well, understanding the content of the law of armed conflict described above, issues under the law of armed conflict concerning disinformation, conditions for violations, etc., would be essential. Moreover, in one's own country's dispatch of disinformation, attention should be paid not only to legality under the law of armed conflict, but also ethical acceptability. Therefore, when examining the legitimacy of dispatching disinformation during armed conflicts, it should be noted that in addition to examining the legality of dispatching disinformation under the law of armed conflict, a separate examination regarding ethical acceptability is also necessary.