

Comparative Study on the Legal Issues of Armed Forces Responding to Disaster among China, Japan and the United States

Wei-hai LI *

Abstract

When entering new millennium, humanity have to confront and respond to recent large-scale disasters, properly called catastrophes as well, such as Wenchuan Great Earthquake, Great East Japan Earthquake, and Hurricane Katrina, China, Japan and U.S have already deployed the armed forces to play shock and vital role in disaster response. By means of normative and comparative research, these three counties' current legal systems with regard to the armed forces supporting to disaster relief firstly have been reviewed aimed to explore the differences between these regulations in this respect. Subsequently, in the process of response to the above catastrophes, there reflects different native legal issues regarding the armed force's employment which we deserve detailed and deeply review and analyze. In compliance with the rule of law, we should emphasize on several next steps to resolve these issues in the future, as follows: fostering new type military-relationship in the disaster relief through further improving the relevant laws, paying much more attention to catastrophic response planning which shall prudently consider and integrate the function and role of armed forces, constantly improving the relevant mechanisms with regard to commanding, organizing and coordinating the military support to disaster relief, establishing and strengthening the emergent corps based on the armed forces with a proportionate scale, special training and professional equipment, further legalizing the successful practices in collaboration with foreign armed forces together support to disaster relief.

* Visiting Professor (September 2013–March 2014), Graduate School of International Cooperation Studies, Kobe University.

S.J.D., Associate Professor, Law School of China University of Political Science and Law.

Introduction

Choosing three countries, namely China, Japan and the United States as the research objects is firstly based on the realistic consideration that all of them are countries seriously suffering from natural disasters in the world. Secondly, the armed forces affiliated with the three countries usually have been deployed to respond to natural disasters, especially giant catastrophes. Many achievements of such employment are made in the disaster relief while there are many lessons need to be learnt from each other. Lastly, all these three countries have determined to use armed forces in disaster response abiding by the fundamental principle, viz: rule of law. In light of such research, the paper would like to adopt two basic methods for this theme, as follows:

1. Comparative research method. According to an authoritative viewpoint, the comparative jurisprudence shall refer to the use of comparative method to study the theory of legal cultural phenomena.¹ By means of this approach, we may deepen the understanding of the legal phenomena of use of armed forces responding to disaster in different countries so that we could visually outline both the advantages and disadvantages of their practices.

2. Normative research method. This shall be mainly to find out the meaning of the law and abstract the rules and principles of the law by analyzing the legal documents or incidents, such as habits and conventions.² In this article, this method will be used to analyze the legitimacy and proportionality of use of armed forces to participate in disaster relief.

Part I. The current legal system of use of armed forces in disaster relief among China, the United States and Japan

A. China

In China, there are mainly three levels of legal rules regulating the use of armed forces to participate in disaster relief works. The armed forces of China have always acted as *the shock force* in emergency rescue and disaster relief, and always

undertaken the most urgent, arduous and hazardous rescue tasks.

1. Constitution. the Constitution is the most fundamental law whose Article 29(1) stipulates, “The armed forces of the People’s Republic of China belong to the people. Their tasks are to strengthen national defense, resist against aggression, defend the motherland, safeguard the people’s peaceful labor, participate in national reconstruction and do their best to serve the people.” Such provision doesn’t clearly and directly define the participation of the armed forces in disaster relief, notwithstanding, the Constitution prescribes the armed forces should participate in national construction and serving the people.

2. Laws. a. Article 58 of *National Defense Act* (hereinafter referred to as NDA) provides the missions of military personnel in active duty including disaster rescue and relief works, which states, “Military personnel in active duty shall carry forward the excellent tradition of People’s Liberation Army.....complete the rescue and relief works.”³

b. Additionally, “the armed forces shall conduct the mission of protecting against and mitigating earthquake disasters conferred by the Nation-state.” *The Act on Protecting Against and Mitigating Earthquake Disasters*(hereinafter referred to as APAMED) explicitly stipulates.⁴

c. In particular, *the Act on Response to Emergencies*(hereinafter referred to as ARE), which came into force on 1st November 2007, defines the term emergent incident as “A natural disaster, accidental disaster, public health incident or social security event, which takes place by accident, has caused or might cause serious social damage and needs to adopt emergent responding measures against it.”

Furthermore, Article 14 of ARE contains the missions of armed forces in emergent response, “The People’s Liberation Army of China, People’s Armed Police Force and militia organizations shall participate in the emergency response and rescue operations in accordance with the provisions of this Law and other relevant laws, administrative regulations and military regulations as well as orders of the State Council and the Central Military Commission.”

d. We can observe as well that the mission of disaster relief shall be authorized to undertake by the armed forces according to *National Defense Mobilization Act* (hereinafter referred to as NDMC).⁵ Article 8 of NDMC can provide indirectly as follows, “When the sovereignty, unity, territorial integrity or security of the Nation-state were threatened, the Standing Committee of the National People’s Republic of China shall have authority to determine a general or partial mobilization act pursuant to the constitution and other relevant laws. The Chairman of the Nation-state shall openly issue a mobilization order in accordance with the decision of the Standing Committee of the National People’s Congress.” For this reason, if a disaster was so destructive as to constitute a threat to the national security, the national defense mobilization could be activated to respond to such disaster.

3. Military-Administrative Regulations. *Regulation on the Military’s Participation in Disaster Rescue* (hereinafter referred to as RMPDR), jointly promulgated by the State Council and the Central Military Commission (hereinafter referred to as CMC) on 7th June, 2005, is an arch stone regulation in regulating the acts of the Military support to disaster relief. Article 2 (1) clearly provides that, “The Military is the rush strength in disaster rescue. To perform the task of disaster rescue as authorized by the Nation-state is an important mission of the Military.”

Furthermore, Article 3 of RMPDR detailed provides the activities the armed forces participating in the disaster relief, as follows: a. Rescuing, transferring or evacuating trapped personnel; b. Protecting key objects; c. Rescuing and transporting important resources; d. Participating in such special rescues as rush repair of roads (bridges, channels), search and rescue on the sea, nuclear, biological and chemical aids, epidemic control and medical treatment and rescue; and e. Eliminating or controlling any other dangerous situation or disaster. When necessary, the military may assist the local people’s government in carrying out such work as rebuilding after any disaster.

Besides, *National Plan on the Military’s Dealing With Emergent Incident*, published and came into force on November, 2006, provides five core emergent missions assigned to the military, including disposing of military conflict crisis,

assisting the local governments to maintain social stability, participating in the disposal of major terrorist attacks, supporting to the local disaster relief.

In addition, there also exist many auxiliary military doctrines and rules regulating other legal issues with regard to military response to disaster relief, in detail such as the commanding and organizing system, the military expropriation in the disaster relief, the legal status of the military in the process of disaster relief, compensatory issues relating to military support, and so on.

B. Japan

1. Constitution. The Constitution of Japan explicitly prohibits the use of force and the rights to maintain the fighting capacity in the Article 9. However, in practice the Diet (or Parliament), which Article 41 of the Constitution defines as “the highest organ of the state power”, established the Self-Defense Forces(hereinafter referred to as SDF) in 1954. Although SDF has been equipped as a conventional military troops, they should be regarded as an extension of the police, created solely to ensure national security by law. Due to the constitutional debate concerning the conventional armed forces’ status, any attempt at increasing the SDF’ combatant capabilities and budget tends to be controversial. Thus the SDF’s capabilities carefully maintain at a defensive level in nature with strict limitation to utilize in overseas operations so that the special capability of disaster relief seems obtain its constitutional legitimacy.

2. Laws. The Self-defense Force Act(hereinafter referred to as SDFA) and Basic Act on Disaster Control Measures (hereinafter referred to as BADCM) should be referred to the two basic laws regulating the legal issues of disaster relief supported by SDF.

Article 83 of SDFA stipulates that support to disaster relief missions should be carried out pursuant to formal requests from local public entities and other stakeholders. However, paragraph 2 of the same article recognizes that the SDF may be actively deployed when “there exists a natural disaster or other kind of disasters, and based on the situation, it is deemed that there exists a particularly urgent need for deployment and there leave no much time to wait for the request in the preceding

paragraph.”

Article 63 of BADCM provides some authorities assigned to officers of the SDF’s support to the disaster relief, such as establishing the precautionary zone in disaster area, making access control in the precautionary zone, making temporary use of the civilian infrastructure supplies and removing some items or facilities.

Notwithstanding , the Basic Principles of National Defense (hereinafter referred to as BPND) in 1957 listed the disaster relief as one of the five basic tasks conducted by the SDF,⁶ thanks to the slow behavior in the relief of the Great Hanshin Earthquake in 1995, subsequently the Government had to publish the new edition of BPND aimed at improving the rescuing capacity of SDF, *inter alia*, establishing disaster emergency corps.⁷

It’s common sense that civilian and military actors are expected to coordinate in accordance with their respective traits and capacities in the field of disaster relief. The “Guidelines on the Use of Military and Civil Defense Assets in Disaster Relief” (Oslo Guidelines) created by UNOCHA in 1994 identify the use of the military facilities and capacities as a means of “last resort.” In other words, “foreign military and civil defense assets should be requested only where there is no comparable civilian alternative and only the use of military or civil defense assets can meet a critical humanitarian need.”

This concept of a “last resort” is consistent with SDF’s approach toward its humanitarian assistance or disaster relief missions(hereinafter referred to as HA/DR). In general, the HA/DR of the SDF are based on three principles : contribution to common good, urgency, and no comparable civilian alternatives, detailed speaking:

a. Contribution to common good means that the SDF’s operations are carried out with the aim of giving social protection to the lives or assets of the people in order to maintain public order. b. Urgency means that there is a recognized pressing need for the operations of the SDF. c. No comparable civilian alternatives means that there is no appropriate option other than the deployment of SDF units.⁸

C. The United States

1. Constitution. There exists no explicit provisions regulating the using of armed forces supporting to disaster relief. Although now according to the Constitution and its relevant statutes, the military has been available to establish justice, insure domestic tranquility, quelling domestic violence and insurrection, disaster relief, etc. as directed by the President and Congress. Initially, during the early years of the nation, the Federal government's response to provide disaster relief to States was strictly limited because which has been regarded as one of typical powers exclusively owned by the States in light of the constitutional principle of *Surplus Power of Sovereignty*.

2. Laws. *The Stafford Disaster Relief and Emergency Assistance Act* in 1979 (hereinafter referred to as Stafford Act) formally established basic principle with regards that armed forces should play a secondary and supporting role in the disaster relief. According to Stafford Act, once the president declares the major disaster and emergent incident, the disaster relief should be controlled and coordinated by Federal Emergency Management Agency(hereinafter referred to as FEMA) in federal level. The armed forces should be limited in providing the relevant supporting to disaster relief to civil authorities, such as providing essential community services, disseminating public health and safety information, adopting health and safety measures, managing and controlling the immediate threats to public health and safety.⁹

3. Military Directives. Department of Defense (hereinafter referred to as DoD) and Joint Chiefs of Staff has issued many instructions and directives specifically and systemically regulating the Military support disaster relief, in which the JP 3-28, *Defense Support of Civil Authorities of 2013* (hereinafter referred to as DSCA) generally is deemed the most important among them.

Until recently, the Secretary of the Army was served as the DoD Executive Agent for disaster relief operations; however, after the 9 • 11 terrorism attack, such duty was transferred to the Assistant Secretary of Defense for Homeland Defense (hereinafter referred to as DHS)in 2003. The Joint Director of Military Support is the special agent that coordinates and monitors military domestic disaster relief

assistance operations responsible for the Assistant Secretary of Defense for Homeland Defense.

In 2002, U.S. Northern Command (hereinafter referred to as NORTHCOM) became the ninth unified Command affiliate with DoD. In terms of homeland defense, NORTHCOM's main mission shall be civil support, including military assistance in domestic disaster operations. Aimed at deploying the NORTHCOM to support disaster relief, DoD has established very reasonable discretion principles and procedures, detailed speaking: a. Legality. Is the support in compliance with laws, or Presidential directives? b. Lethality. Is use of lethal force by or against DoD personnel likely or expected? c. Risk. Can the request be met safely, or can concerns be mitigated by equipment or training? d. Cost. Who pays, and what is the impact on DoD budget? e. Appropriateness. Is the requested mission in the interest of DoD to conduct? Who normally performs and is best suited to fill the request? f. Readiness. What is the impact on DoD's ability to perform its primary mission?¹⁰

Part II. Chinese Armed Forces Responding to Wenchuan Great Earthquake and Its Legal Issues

A. Basic Information about the disaster

On May 12, 2008, a terrible Wenchuan Great Earthquake(hereinafter referred to as WGE) which was measured 8 on Richer Scale occurred in Sichuan Province. The earthquake caused differently serious loss in ten provinces or municipalities including Sichuan, Chongqing, Yunnan, Gansu, Shanxi and so on, which covered 500,000 square kilometers of homeland. 417 counties were enlisted as the hardest-hit area that covered nearly 132,596 square kilometers and nearly 19,867,000 people were afflicted.¹¹ According to the official statistics, the direct economic loss would reach to about 845.1 billion RMB Yuan.¹² The casualties also reached a unprecedented level, taking Sichuan for example, 68,712 people died, 17,921 people missing, 4,450,000 people got wounded among which nearly 7,000 disabled.¹³

B. The operation of Chinese armed forces after the Earthquake

Many local governments in the earthquake affected areas were suddenly disabled so as to lose their basic commanding and organizing capabilities to disaster relief. After the earthquake, the People's Liberation Army (hereinafter referred to as PLA) firstly initiated its emergent command mechanism and urgently established three level of command system, i.e., Disaster Relief Military Headquarters, Chengdu Military Joint Command and five Command Posts of Response Area. Through the coordination of Disaster Relief Military Headquarters, the CMC sent order for Chengdu and Lanzhou Military Command to urgently deploy 16,000 military personnel to support the disaster rescue within the first 72 hours after the earthquake. Sichuan Provincial Military Department also organized 13,000 reserve personnel to participate in disaster relief in the severely afflicted areas within only four hours after the earthquake. The PLA totally organized 146,000 soldiers to support the civil authority in the whole process of disaster relief.¹⁴

C. Legal problems existed in the use of armed forces responding to such catastrophe

1. Legality of deploying so massive armed forces to participate in disaster relief be challenged. Notwithstanding, the above mentioned laws have provided the legitimacy of use of armed forces in disaster response, the scope and limitation have never been clearly regulated. Especially once the catastrophe happens, much more armed forces should be necessary to be dispatched as soon as possible. Concurrently without such special provisions regarding using so much massive armed forces, the legitimacy responding the WGE would be challenged by rule of law. Meanwhile, which procedures abided by the government to request for military support to disaster relief have not explicitly provided.¹⁵

2. Lack of effective negotiation and coordination mechanism between the armed forces and the civil authorities. a. The function division between the armed forces and other competent disaster relief departments is not clear, especially the legislation on the coordination and cooperation between them is too abstract and formalistic to meet the demands in practices. According to ARE, different command

agencies would be established and the staff members shall include the heads of local government, PLA, Armed Police and other departments. However, how the armed forces fulfill their responsibilities and in what manner can they coordinate with the other competent disaster relief departments are not involved in this law. The conduct of disaster relief work pays more attention only on the command relationship between upper and lower. The basic coordination between the armed forces and the administrative departments operate only by means of no-scheduled meeting, which may easily give rise to many contradictions and misunderstandings.

b. Both the military and the civil authorities have already built up their own separated information collection and analysis systems, nevertheless, lack of information sharing procedure resulted in many problems in effective communication, *inter alia*, the military often refuse to share information with the local governments on the excuse of military secrets.

c. The request procedure for military support to disaster rescue be equivocal. Although the RMPDR clearly provides the procedures to request for the military support to disaster relief, its provisions are too harsh and lack of maneuverability and feasibility. For example, the node time initiating the military participating in the disaster relief is the key premise for the subsequent civil authorities request for disaster assistance form the military. What disaster occasion would be regarded as the basic requirements to the node time and which authorities would decide the node time are not clearly provided in RMODR, which result in many difficulties to the coordination between the military and civil governments. Besides, the civil government always prefer the strong manpower, material resources to the special capabilities of disaster rescue and relief of the military, which not only waste the precious military resources and decrease the combatant capability, but harm the military's mission of defending the nation and even obstruct the national security in some degree.

3. Critique on the legality and properness of excessive use of armed forces to participate in post-disaster reconstruction. During the disaster recovery, the purpose of post-disaster reconstruction and renaissance should make the disaster areas

return to a normal or even better state, considering that the situation in disaster area has become stable and safe as before, the civil authorities have restored its original administrative functions and operation capabilities so that they should undertake the comprehensive leadership in all the respect of reconstruction and renaissance, by contrast, the armed forces should immediately withdraw from the disaster affected areas. However, the reality is that the armed forces has beard almost all post-disaster reconstruction works, such as cleaning up the ruins, repairing the roads, providing food and even constructing the prefabricated houses, etc. Just like what happened in the military support to disaster relief after WGE, the armed forces have undertaken so many tasks like rebuilding schools, hospitals, roads and other public facilities, transporting building materials needed, even participating in resettling disaster victims. According to an incomplete statistics, almost 130,000 military personnel have participated in the recovery and renaissance of post disaster. Given that the military superiority in manpower, equipment and operation efficiency, notwithstanding, such numerous military members involved would be much favorable to the local governments and the victims, after all, the armed forces overly participated in a large number of major projects would deprive other commercial entities and industries of the opportunities regarding post-disaster reconstruction work, which contradict the rules of market-oriented economy. As far as the armed forces itself, although undertaking a long-term reconstruction work would help them win a high reputation, it would be a complete deviation for their fundamental function as national defense power at all.

D. Some further improvements with regard to the military support to disaster relief

1. Ameliorating the relevant legislations. To form a standard operating procedures with respect to responding to disasters and perfect the existing natural disaster response mechanism between the military and civil authorities, the best approach would be to formulate a comprehensive and basic disaster management law which detailed clarify the duty scope, power margin and its relating responsibility among the different rescuing entities, especially the PLA, Armed Police, reserve component and militia.

Meanwhile, thanks to many harsh provisions existing in current laws, much more detailed rules for the implementation of the disaster laws should be published as soon as possible, especially the standard operating procedure provisions consisted of the steps, methods, means and time limits regarding the military support to disaster relief aimed at improving maneuverability and strengthening guidance on the work of responding to natural disasters.

2. Improving the relevant mechanisms regarding commanding, organizing and coordinating the military support to disaster relief. Aimed to smooth communication and effective coordination mechanism between military and civil authorities, it would be very necessary to establish the unified, permanent and special emergency management and coordination agency to comprehensively address the issues in regard to the armed forces' participation in disaster relief.

In response to natural disaster, such coordination agency shall play pivotal role in guiding and coordinating the disaster response, which should establish three levels institution, viz: central, provincial and prefecture-level, and consist of civil official, military officer, armed police officer with high ranks.

3. Constantly improving the relief capabilities of professional emergent corps through various approaches, especially training and drill, simulation and manoeuver, actively participating in disaster relief at home and abroad.

After the WGE, the whole Nation-state have realized and understood the far-reaching meanings and great importance of building different kinds of professional emergent corps. The PLA, Armed Forces and civil governments at various levels have established military-civilian joint response mechanisms for natural disasters, set up a mobile command platform for emergency response at the strategic level, pre-stored and pre-positioned materials and equipment urgently needed for emergency rescue and disaster relief in key areas, worked out relevant scenarios for military units at and above the regiment level, and organized regular joint military-civilian exercises and training, thereby enhancing their capabilities for emergency rescue and disaster relief in all respects.

So far, China has formed nine national level professional emergent corps with a total membership of 50,000. They are emergency-response teams for flood relief, earthquake rescue, Nuclear, Biological, Chemical defense, emergency airlift, rush repair of transportation and power facilities, maritime search and rescue, mobile communications support, medical aid and epidemic prevention, and meteorological support. In collaboration with relevant provinces (autonomous regions, and municipalities directly under the central government) and based on active and reserve forces, all Provincial Military Departments have joined to set up professional emergency-rescue units at the provincial level totally numbered 45,000 members.

Part III. Japan SDF Responding to Great East Japan Earthquake and Its Legal Issues

A. Overview of the use of SDF in disaster relief

According Japanese official survey, at 2:46 p.m. on March 11, 2011, Great East Japan Earthquake(hereinafter referred to as GEJE) measured at a magnitude of 9.0 on the Richter scale occurred 80 miles off the coast of Honshu. Following the earthquake, a massive tsunami swept across the northeast coast of Japan, reportedly reaching several miles inland and flooding hundreds of square miles of land, including 42 municipalities in four prefectures. With tremendous destruction and terrible damage to roads, bridges, ports, railroads, buildings, and other infrastructure, as well as more than 28,000 people dead or missing, the full disaster affected more than two dozen prefectures with a population estimated at over 15 million. Current estimates of the cost of destruction are between \$122 billion and \$305 billion (between 2.2 percent and 4 percent of Japan's GDP). A month after the disaster, more than 130,000 people were still housed in more than 2,500 shelters.

Directly following the earthquake, at 14:50, the Ministry of Defense established an Emergency Headquarters and commenced information gathering operations using aircraft and other military means. At 15:30, the Emergency Headquarters held its first meeting, and at 18:00 and 19:30 the Defense Minister respectively ordered

SDF to dispatch emergent units to respond to the earthquake and the nuclear power station accident that followed. In response to this order, the SDF mobilized approximately 8,400 personnel to urgently launch disaster response on the first day of the earthquake. The SDF dispatched personnel and equipment as many as possible, implementing an initial response that was both large in scale and speedy in order to save the lives of disaster victims. On March 14, a joint task force for the GEJE was formed under the command of the GSDF Tohoku Headquarters, which included the participation of the MSDF Yokosuka Commanding General and the ASDF Air Defense Commander. This allowed for a much larger scale dispatch in response to the disaster by means of joint operations between the GSDF, MSDF, and ASDF. According to the official statistics, the total number of the SDF that were dispatched to disaster relief was nearly 100 thousand SDF personnel, i.e., half of total SDF, about 540 aircrafts, and nearly 60 ships, by far the largest action after the World War II.¹⁶

In response to the worst nuclear disaster jointly caused by earthquake and tsunami occurred in Fukushima, approximately 500 MSDF, ASDF, and other personnel were mobilized, mainly coming from the Central NBC Weapon Defense Unit. These activities marked the largest mobilization of personnel and equipment in history of response to nuclear crisis so that close cooperation was carried out in collaboration with the armed forces of the U. S. and other countries, meanwhile, reserve personnel were firstly summoned to respond to disaster with SDF side by side.

B. Comment on the Japan-U.S. Alliance over HA/DR

From the perspective of international cooperation, the Japan-U.S. partnership expanded to an unprecedented scale covering a range of areas from disaster relief to nuclear response which be regarded as one of most successful HA/DR. The HA/DR operations carried out by the U.S. forces is called Operation *Tomodachi*. At most, the U.S. forces mobilized approximately 16,000 personnel, approximately 15 vessels, and approximately 140 aircrafts. HA/DR operations by the U.S. forces became a symbol of the *kizuna* (bonds of friendship) that the bilateral alliance represented. Indeed, following the Great Hanshin-Awaji Earthquake, recommendations were presented regarding joint operations between Japan and the U.S., reflecting on the

fact that the capacities of the U.S. forces were not amply harnessed in the response to the aforementioned earthquake. Nevertheless, many challenges stood in the way of operationalizing such recommendations, but in the response to GEJE, some difficulties have been overcome with some degree by establishing the corresponding coordination mechanisms, as follows:

1. Establishing a policy coordination mechanism with powerful authority and high efficiency at the decision level. The U.S. deployed not only personnel from the U.S. Embassy in Tokyo and members of the U.S. forces in Japan, but also headquarter staff from the Pacific Command in Hawaii and members of the Chemical Biological Incident Response Force of the U.S. Marines. 160 support staff, including members of the Nuclear Regulatory Commission and the Department of Energy, were sent to the U.S. Embassy in Tokyo.

A Japan-U.S. coordination meeting was formally launched to conduct overall coordination between the two countries on March 22, including the response to the nuclear accident. It met on approximately 40 occasions nearly every day until mid-April. At the meeting, working teams were established on radiation screening, processing of nuclear fuel rods, nuclear reactor, and medical and life-saving support. Information was shared commonly on the situation of the nuclear reactors, among other matters, and exchanges of views took place on coordination of assistance and measures for the stabilization of the nuclear reactors and spent-fuel pools.¹⁷

2. Establishing a operation coordination mechanism with great flexibility and good adaptability at the executive level. Bilateral coordination centers at the military level were swiftly set up in Ichigaya (Ministry of Defense), Yokota (U.S. Forces Japan), and Sendai (Joint Task Force-TH). In order to coordinate the SDF and U.S. forces, approximately 80 personnel from the Ministry of Defense were assigned to the three locations, and mutual coordination was conducted through video conference system that linked the U.S. Embassy in Tokyo.

Nevertheless, the bilateral coordination centers, established for the first time as a vehicle to respond to the disaster, faced many challenges. As pointed out in the Ministry of Defense's report, *Lessons on the Response to the Great East Japan*

Earthquake (Interim Report) released in August 2011, the challenges including: a. insufficient arrangements for the initial necessary coordination; b. obscure definition of the center's role; and c. unclear U.S. contact point at the Ministry of Defense.¹⁸ At the Japan-U.S. summit meeting in May 2012, Both the countries' leaders agreed to smoothen bilateral coordination while bearing in mind the outcomes of Operation *Tomodachi*. These efforts are expected to play an active role in the Japan-U.S. "dynamic defense cooperation."¹⁹

C. Rethinking about some legal issues regarding SDF's support to disaster relief

1. Reviewing the tendency of SDF's Role in Disaster Response: public opinion vs. legal norms. The broad public support for the SDF's role in disaster relief missions may be confirmed from the public opinion survey on the Ministry of Defense and the SDF that has been conducted regularly by the Cabinet Office since 1972. According to the 2012 survey, the largest percentage of the respondents, 82.9%, supported the notion that "disaster relief mission" was the purpose of the SDF's existence. This was approximately 4% higher than the percentage of respondents that answered "ensuring the nation's safety (prevent invasion of foreign countries)" (78.6%). Even in past public opinion surveys, the percentage of respondents who said they support disaster relief missions was around 8 to 9% higher than the percentage that said they support national defense missions. Furthermore, disaster relief missions had nearly double the support of other missions, including "contribution to international peace cooperation operations" (48.8%) and "maintenance of order in the country" (47.9%).²⁰

In light of Article 3 of SDF Act, the basic tasks of SDF should include maintaining international peace and security, fighting against foreign aggression and keeping public order if necessary, notwithstanding, the disaster relief mission is stipulated by the Article 83, in view of originalism explanation, the legislature initially excluded the disaster relief as one of basic tasks of SDF at that time. So there exists a contradiction between the SDF Act and the public opinion which shall give a deep effect on some legal issues with SDF's role in the future worth seriously thinking repeated by Japan Diet and Central Government, such as how to balance the legal roles between security guarantee and disaster relief, how to foster the capability of

disaster rescue and relief in accordance with the public expectance, how to rationally distribute and appropriate fiscal funds to SDF' support to disaster relief, and so on.

2. Reviewing limitation of SDF's activities in Disaster Response: something vs. everything. The activities of the SDF are both large in scale and wide spanning in GEJE disaster relief, which include rescue, transportation assistance, livelihood assistance, emergency rehabilitation assistance.²¹ In post-2011 Tohoku, survey results conducted by news agencies such as Yomiuri Online, reveal that 82% rated SDF response as "positive" compared to 6% that regarded government response as positive. Further, survey results of the three most affected areas (Iwate, Miyagi and Fukushima Prefecture) show that 72.4% described the activities of the SDF as their "major source of post-disaster encouragement," compared to 27.2% that stated the central and/or local government as such.²²

In view of SDF's good behavior and high reputation in the disaster relief, so we have to think deeply on what is the margin and the most important function of support to disaster relief of SDF, which undoubtedly has served as the leading status for every stage of the disaster management replacing local governments. The relevant law has never prescribed the deadline and period of SDF employment in the disaster response so as to the local governments may utilize all possible excuses to request SDF for continuing to provide stability and assistance on site even in the period of disaster recovery and renaissance. Therefore, as for how the principle of limitation and proportionality fully reflected in the future improvement of its relevant laws aimed at keeping a good relationship between SDF and civil authorities, especially local governments, we could not find a clear approach till now.

3. Reviewing the legal relationship in the safety and security of critical infrastructure between SDF and Major Enterprises: insulation vs. participation. A nation's critical infrastructures, just like nuclear plants located in Fukushima serve as the foundation for effective governance, economic vitality, and a resilient civil society. In the aftermath of the GEJE, the Japanese government and Tokyo Electric Power Company(hereinafter referred to as TEPCO) came under intense criticism for not ensuring that the facilities at Fukushima were adequately prepared for the

disaster. In particular, they have been faulted for not ensuring that safety precautions at the plant had been upgraded to global industry standards and that adequate plans were not in place to protect the back power systems during flooding.

The response to the accident at the Fukushima Daiichi Nuclear Power Station was the most serious, dangerous and unpredictable. This owed to the fact that the SDF without nearly any touch with TEPCO in the field of safety and security of nuclear plant at ordinary times, could not sufficiently obtain the information necessary for further operation as the crisis continued to escalate, including the meltdown of the reactor core, the hydrogen explosion at the reactor building, and the leakage of radioactive material, all caused by the earthquake and tsunami.

At the site of the nuclear accident, based on the Prime Minister's instructions, the SDF for the first time admittedly provided a unified response in partnership with the fire department, police, other ministries and agencies, in determining the guidelines for spraying water over the nuclear power station and carrying them out, though they were limited in fixed scope. Notwithstanding that, we have to review the legal relationship in the safety and security of critical infrastructure between SDF and Major Enterprise, especially at ordinary times.

Because of the dangers and concerns of a release of radioactive waste, the state of nuclear facilities during disasters is an enduring concern. The U.S. system for ensuring the safety and effectiveness of nuclear power plants differs significantly from that implemented in Japan. The United States has multiple independent groups, including the military that have authority over nuclear infrastructure with the power to audit and direct compliance. So it is very necessary for Japan that central government should prompt to built a robust and multifaceted regulatory system which invite SDF to participate in the field of nuclear safety and security aimed at working in tandem to promote safe operations and best practices. It is critical that both industry, SDF, NGO and other federal regulators work together to agree on lessons learned from Fukushima and determine how they can best be implemented.

Part IV. U.S. Armed Forces Responding to Hurricane Katrina and Its Legal Issues

A. Overview on the use of armed forces in disaster relief

In the morning of August 29, 2005, Hurricane Katrina which is regarded as the most serious nature disaster in the history of America ravaged the Gulf Coast states of Louisiana, Mississippi, and Alabama, forever changing New Orleans, one of American most venerable cities. The giant catastrophe killed 1,836 people, caused 5 million people lost their home, affected an area over 93,000 square miles, disrupted the livelihood of millions and destroyed or degraded most of critical infrastructures in these regions.²³

Overall, in response to the Hurricane Katrina, 72,000 armed forces were taken plunge into the support operations of disaster relief, which was the largest military deployment within the United States since the Civil War.²⁴ The leaders of the military also prided themselves on which DoD should be the cornerstone in this support disaster to relief operation during Hurricane Katrina.²⁵ Among all of the armed forces participating in support operation, the Joint Task Force Katrina(hereinafter referred as JTF-Katrina) obtained the best reputation so that General Russell Honoree, its respectable commander was praised as the most efficient disaster relief hero.²⁶ Comparatively speaking, both DHS and FEMA were seriously criticized and satirized for the lack of unified leadership and disorganized management in the disaster relief, and especially the delay of the rescue that had led the New Orleans to a city of disorder, chaos and evil, a hell on earth.²⁷

B. Legal problems existed in U.S. armed forces responding to Hurricane Katrina

1. With the limitation of double sovereignty between Federal and State, there existed great defect in the pre-responding mechanism against catastrophe so that it led to be very difficult to earlier dispatch armed forces in advance for effective disaster relief.

Although the relevant laws have designed nice mechanism and procedures

responding to major disaster and emergent incident, they were not enough to provide much more measures fighting against catastrophes so that only Catastrophic Incident Annex affiliated with the National Response Plan (hereinafter referred to as NRP-CIA) has granted the relating activation mechanism to DHS. Only after the DHS activating the NRP-CIA, all the relevant departments or agencies would carry out the subsequent disaster relief.

However, there existed two great defects in the NRP-CIA, as follows: One is that even if a catastrophe suddenly occurred, the federal government would provide corresponding federal support only after receiving and reviewing the formal request from the State. But in such tragic context, maybe most of civil authorities collapsed so that it would be very hard for the State to present rational and formal request to the Federal Government! “No request, no assistance”, the prime principle of disaster relief would cause the armed force can not support to the civil governments as earlier as possible at all, just what happened in New Orleans.²⁸

Another fatal shortcoming of NRP-CIA is its bad combination with Stafford Act so that the armed force has not enough authority to actively support to disaster relief after the catastrophe because of NRP-CIA’ lower level activation mechanism. Some point out that in cases of a major catastrophe, the President through the Stafford Act can designate and deploy federal resources without following NRP procedures. This view does not address if the NRP procedures in place in the event of a major catastrophe—whether or not the President chooses to federalize the response—are sound. Therefore, there would be a great pity that it took three cherished whole days, the time matters the life of so many people, from the Governor Blanco presenting the request for armed force to deploying the JTF-Katrina to the disaster affected area which wasted many golden time.²⁹

2. General speaking, the presidential emergent power shall be classified as one of implicit powers without clearly written in Constitution so that the President use its emergent power to enforce law in disaster areas with great caution, which must be strictly constrained by *the Posse Comitatus Act*(hereinafter referred to as PCA).

When the New Orleans was overwhelmed by the flood and the local police escaped their post, the New Orleans was suddenly turned into the Paradise of crime on the earth, where so many felonies, such as robbery, rape, intentional destruction of property occurred so frequently which presented fully the ugliness and hypocrisy of human nature.³⁰ Although the President had earlier ordered DoD which should undertake the responsibility to save lives, protect property, secure critical public facilities and eliminate the threats of secondary disasters.³¹ But based on the Stafford Act, the military should be strictly restricted by the PCA as well, and cannot execute the law enforcement operations to restore the collapsed social peace and order even in the period of giant catastrophe. Consequently, although the military had concretely planned how to respond to Hurricane Katrina since August 24, the President did not dispatch even one military personnel into the disaster area till September 12, when the local disaster victims had suffered from all the pains of the world to the fullest extent.³²

Notwithstanding, we have admitted that enforcing law by the military should be viewed as a political taboo for keeping good civil-military relationship in modern democracy, when the giant catastrophe occurred and then the social order collapsed suddenly, It will be a international joke to strictly abide by and devoutly respect for the political taboo as stubborn as a mule. So the best approach to resolve such issue in the future maybe amend the Stafford Act or PCA to establish the requisite exceptional rules of permitting the military to support law enforcement for replacing the collapsed civil authority in the post-catastrophe.

3. The lack of smooth communication between the military and civil authority, especially the DoD/DHS or Federal/State coordination was not effective during Hurricane Katrina, resulted in weakening effectiveness and efficiency of the disaster relief command system with uniform efforts.

Generally speaking, the National Guards would take part in the disaster relief only under the leadership of state's governor. However, at least in the first few days after Hurricane Katrina, there had never established a unified-mechanism for disaster relief command among the DoD personnel and National Guards. Even the

NORTHCOM did not know how to coordinate and connect with the National Guards and what they should do, and *vice versa*. National Guard also did not know their assignment and disaster relief programs of JTF-Katrina.³³

Afterwards, with ceaseless influx of National Guards in the disaster area, who were serving active duty in each state, the management and command of these forces became much more chaotic. If there were no any improvement in the emergent coordination and command regime, a platform of information communication and exchange at least should be completely necessary. Under the condition of that the National Guards and Military should always keep independent in the disaster relief according to the concurrent law, the platform maybe guarantee effective coordination and command among each relief units.

4. Aimed at responding to major disaster or emergent incident, especially giant catastrophe, there should exist great feasibility to foster the professional emergent corps based on the National Guards. Lieutenant General H Steven Blum, Chief, National Guard Bureau has sung high praise for the activities of National Guards during Hurricane Katrina, "I am particularly proud of the timeliness and magnitude of the National Guard's efforts in advance of Hurricane Katrina and our response in its immediate aftermath. National Guard forces were in the water and on the streets of New Orleans rescuing people within four hours of Katrina's passing. More than 9,700 National Guard Soldiers and Airmen were in New Orleans by the thirtieth of August. The National Guard deployed over 30,000 additional troops within 96 hours of the passing of the storm."³⁴

Normally, the National Guard operates under the control of state and territorial governors. In response to disasters and civil disorders, governors can order National Guard personnel to perform full-time duty, commonly referred to as "state active duty." In this state capacity, National Guard personnel operate under the control of their governor, are paid according to state law, can perform typical disaster relief tasks and are not subject to the restrictions of the PCA, that is to say, they can perform law enforcement functions.

Part V. Conclusion

When entering new millennium, humanity have to face and respond to recent large-scale disasters, giant catastrophes, such as WGE, GEJE and HK, we would be eager to expect the armed forces, the entity equipped with the most advanced devices, organized with exquisite structure and controlled with strict discipline, should play shock and vital role in rescue and relieve the disaster afflicted victims just like Redeemer on earth. In virtually every major respect of the comparative research on armed forces' support to disaster relief, we have been reminiscent of the challenges the not only China, Japan and U.S., but also all the world faced with regard to such worldwide problem. Addressing the shortfalls of catastrophic disaster response is vital. Catastrophic disasters are one of the few challenges that can bring even the most rich and powerful nations to their knees. Yet, these shortfalls are avoidable calamities. In the end of this paper, I would like to offer multiple recommendations for the policymakers and professions to address shortfalls in terms of armed forces' support to disaster relief. Some of these next steps are as follows:

Despite that the above three counties have made relatively perfect disaster laws, but aimed at further improving the relevant laws for response to giant catastrophe, nothing is too good so that the new type military-relationship in the disaster relief shall be detailed clarified and legitimately fostered which the operation scope, employment scale, authority limitation, basic procedure of armed forces support to disaster relief should be regulated by rule of law, i.e. the principles of legitimacy, limitation and proportionality. Standard Operation Procedures with great feasibility and practicality should be very important to improve the effectiveness of armed forces support to disaster relief, Japan and U.S. have made great achievements, but China remains relatively backward in such respect.

In the terms of disaster preparation, all the countries should pay much more attention to catastrophic response planning which shall prudently consider and rationally arrange the function and role of armed forces, *inter alia* play its shock and vital role in maintaining safety and security of critical infrastructures, such as nuclear plant, grand dam, and major mines and factories related to dangerous materials. To

ensure that efforts to plan for catastrophic disaster are more integrated, the federal or central government, particularly when coordinating with local governments, large commercial entities and NGO, should emphasize the armed forces' *ad hoc* suggestions and opinions with regard to catastrophic disaster planning.

Constantly improving the relevant mechanisms regarding commanding, organizing and coordinating the military support to disaster relief always shall be encouraged. Federal or central government need to end the practice of placing too much emphasis on the federal or central government's role in dealing with routine disasters. Decentralized execution should be encouraged so that local authorities should unquestionably undertake the prime leadership in the process of responding to routine disasters. Nevertheless, when catastrophic occurred suddenly, maybe all the responding mechanism and plans of routine disasters, including the civil authorities themselves, would collapsed and paralyzed at the same time, the Federal or central government should decisively order the armed forces should keep the proportionate priority in the commanding, organizing and coordinating systems.

The more attention given to disaster preparedness before disaster strikes, the more efficiently resources can be applied to ensuring the resilience of the nation and rapid recovery after a disaster. So for attaining a robust and feasible capacities of armed forces responding to disaster, the emergent corps with a proportionate scale, special training and professional equipment should always be expected to establish and strengthen , notwithstanding China, Japan and U.S. have made great efforts in such term.

In terms of in collaboration with foreign armed forces together support to disaster relief, the Japan-U.S. partnership covering from disaster relief to nuclear response has be regarded as one of most successful cooperation of HA/DR in the world. But we should deserve to further rethink and review repeatedly some important issues, such as the legal status of foreign military personnel and disaster relief equipment, the authority and responsibility of division in command and control, the establishment and operation of high efficient coordination mechanism.

References

- Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong., *Final Report.: A Failure of Initiative*, 2d Sess. (2006).
- Dr. Jay Carafano, *Improving the National Response to Catastrophic Disaster*, 15 September 2005.
- McHale, "Disaster Response Time Expected to Improve": *National Defense*, No. 630, 2006.
- NI Zhengmao, *Exploration and Analysis on the Comparative Jurisprudence*, Beijing: Chinese Legal Press, 2006.
- Quigley, Bill, "Six Months After Katrina: Who Was Left Behind Then and Who is Being Left Behind Now?": *Counter Punch Diary*, February 21, 2006.
- Ryoichi Oriki, "The Role of Self-Defense Forces (SDF) in Responding to the Great East Japan Earthquake" : *A Japanese Perspective, NIDS International Symposium on Security Affairs 2011*, November 9, 2011.
- Tomonori Yoshizaki, "The Military's Role in Disaster Relief Operations": *A Japanese Perspective, NIDS International Symposium on Security Affairs 2011*, November 9, 2011.
- Yezi Yeo, "De-militarizing Military: Confirming Japan's Self-defense Forces' Identity as a Disaster Relief Agency in the 2011 Tohoku Triple Crisis": *Asia Journal of Global Studies*, Vol. 5, No 2 (2012-13).
- ZHOU Yongkun, *Jurisprudence-A Global Vision*, Beijing: Jurisprudence Press, 2010.

Notes

- 1 NI Zhengmao, *Exploration and Analysis on the Comparative Jurisprudence*, Beijing: Chinese Legal Press, 2006, p.8.
- 2 ZHOU Yongkun, *Jurisprudence-A Global Vision*, Beijing: Jurisprudence Press, 2010, p.18.
- 3 *National Defense Act*, come into force in China on 14th March, 1997.
- 4 *Act on Protecting Against and Mitigating Earthquake Disasters*, come into force in China on 1st May, 2009.
- 5 *National Defense Mobilization Act*, come into force in China on 26st February, 2010.
- 6 According to BPND published by Japan government on 1957, the SDF shall conduct five missions, which are homeland defense, policing, coast guard, preventing the violation of airspace from happening and disaster relief.
- 7 HUANG Zhimao, *The Disaster Relief Working Mechanism of Japan SDF*, 2011, viewed on 11th March, 2011 <<http://news.163.com/special/ribenjiuzai/>>.
- 8 Tomonori Yoshizaki , "The Military's Role in Disaster Relief Operations": *A Japanese Perspective, NIDS International Symposium on Security Affairs 2011*, November 9, 2011, p.74.
- 9 42 U.S.C. §5192(2007).
- 10 JP 3-28(2013),chapter II-3.
- 11 See *the Notice of Post-Disaster Reconstruction and Restoration After 5.12 Serious Earthquake*, on May 7, 2009, made by People's Government of Sichuan Province, Recently viewed on February 15<http://www.gov.cn/jrzg/2009-05/07/content_1306695.htm>
- 12 Id.
- 13 Id.
- 14 *The General Chief of Staff Discloses the Detailed Process of Armed Forces Responding to Wenchuan Great Earthquake*, 16 February 2010, viewed on 12 January 2014<<http://news.eastday.com/c/20100216/u1a5024352.html>>
- 15 SONG Jingsong & DENG Yunfeng, "A Comparison of Command Structure in Emergency Management among China, Germany and the United States," *The China Public Management Journal*, Vol 1, (January

- 2011). p. 77.
- 16 LIU Yana & LUO Xi, *Japan's emergency management mechanism and Implications for China—3 11 earthquake for example*, p.18.
- 17 Id. Note 8, p.83.
- 18 Id. Note 8, p.85.
- 19 Ryoichi Oriki , “The Role of Self-Defense Forces (SDF) in Responding to the Great East Japan Earthquake” : *A Japanese Perspective, NIDS International Symposium on Security Affairs 2011*, November 9, 2011, p.14.
- 20 Id. Note 8, p.77.
- 21 Department of Homeland Security, *Special Feature: Response to the Great East Japan Earthquake*, viewed on 22 February 2014<https://www.llis.dhs.gov/sites/default/files/02_SpecialFeature.pdf>.
- 22 Yezi Yeo, “De-militarizing Military: Confirming Japan’s Self-defense Forces’ Identity as a Disaster Relief Agency in the 2011 Tohoku Triple Crisis”: *Asia Journal of Global Studies*, Vol. 5, No 2 (2012-13), p.78.
- 23 Dr. Jay Carafano, *Improving the National Response to Catastrophic Disaster*, 15 September 2005, viewed on 22 February 2014<<http://www.heritage.org/Research/HomelandDefense/tst091505a.cfm>>.
- 24 McHale, “Disaster Response Time Expected to Improve”: *National Defense*, no. 630 (2006), p.90.
- 25 Sara Wood, *DoD Leaders Rep. on Hurricane Response*, U.S.A. AM. PRESS SERV., Nov. 10, 2005.
- 26 Op - Ed., *Posse Comitatus Act*, S. D. Union - Trib., Sept. 26, 2005, at B6.
- 27 Quigley, Bill, “Six Months After Katrina: Who Was Left Behind Then and Who is Being Left Behind Now?”: *Counter Punch Diary*, February 21, 2006.
- 28 Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong., Final Rep.: A Failure of Initiative, 2d Sess. (2006), viewed on 22 February 2014< [http:// www.gpoaccess.gov/congress/index.html](http://www.gpoaccess.gov/congress/index.html)>.
- 29 Id., p.202.
- 30 Id., p.207.
- 31 DoD Directive 3025.1.
- 32 See “*How the Pentagon Caught Katrina*”: *U.S. News and World Report*, Sept. 26, 2005, p. 2.
- 33 Maj. Gen. Timothy J. Lowenberg, “The Role of the National Guard in National Defense and Homeland Security”: *National Guard Ass’n of the U.S.* (2005), viewed on 22 February 2014 <[Lhttp://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/000000000457/primer%20fin.pdf?False](http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/000000000457/primer%20fin.pdf?False)>
- 34 Lt. Gen. H. Steven Blum, Chief, National Guard Bureau, *Written Statement of Joint Armed Services and Homeland Hearing*, November 9, 2005.