

**The Law of Military Operations and Self-Defense in the U.S.-Japan Alliance**

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# THE LAW OF MILITARY OPERATIONS AND SELF-DEFENSE IN THE U.S.-JAPAN ALLIANCE

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**T**he U.S.-Japan alliance is the most important bilateral relationship in the world for international peace and security, yet it operates within two very different national legal systems. For decades, the alliance between Japan and the United States has underwritten political and economic development in East Asia, generating confidence and stability that impact the global system.<sup>1</sup> Richard L. Armitage and Joseph S. Nye Jr. have described Japan accurately as “the most capable U.S. ally in the most important part of the world.”<sup>2</sup> Situated astride the confluence of China, North Korea, and Russia, Japan makes a greater contribution to international peace and security than any nation other than the United States.<sup>3</sup> In particular, the Japan Maritime Self-Defense Force (JMSDF) is the most professional, advanced, and capable conventional naval partner of the U.S. Navy.<sup>4</sup>

While the two states share values of dignity and human rights, individual and economic freedom, and a state system governed by the rule of law, they have different languages, cultures, and legal systems. These legal systems take distinct approaches to authorizing military operations and implementing the inherent right of self-defense under international law, and they vindicate these rights through

dissimilar legal doctrines, decision-making processes, and national command authorities.

This article explores how Japan and the United States manage and pursue the authorization for employment of military forces and the conduct of operations within their respective legal systems and how the two approaches converge within the alliance structure. Further, the article compares

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how the United States and Japan develop and implement the international law of self-defense, and in particular explores how this concept is expressed within Japan's unique and complex legal regime. While the two allies share strategic interests and an integrated vision of regional security, understanding their separate legal systems can facilitate combined operations and help the two allies work together more efficiently.<sup>5</sup> Making this process more transparent helps to inform American and Japanese decision makers and operational planners, reassures neighboring states that the alliance is strong and the two states are synchronized, and thereby dissuades potential adversaries.

This article proceeds as follows. First, we examine the relationship between the United States and Japan and the bilateral defense treaty that binds them. Second, we identify the key differences between the national security laws of the two countries. While U.S. forces conduct operations at the command of the president through executive power under Article II of the U.S. Constitution, each operation the JMSDF conducts requires a specific, underlying law, since military operations are considered administrative actions by the government. Third, we explore the legal basis for self-defense in the face of armed attack, as applied within the two systems. While the U.S. president as commander in chief has a relatively simple legal basis for initiating self-defense actions, Japan must set in motion precise procedural and legislative processes before it can exercise the right of individual or collective self-defense. Finally, this article identifies how the United States and Japan lawfully may contend with threats short of war, or what Japan first termed the *gray zone*. While the United States responds to such challenges within the paradigm of self-defense, including unit self-defense, Japanese military action must be authorized under Japanese municipal law, not as self-defense but as a "use of weapons," a related concept that is separate from national self-defense.

#### LEGAL OBLIGATIONS IN THE U.S.-JAPAN ALLIANCE

The two pillars of Japan's national security policy are national self-help and collective self-defense with its treaty ally, the United States. The two approaches these pillars represent are reflected in the original and the current bilateral security treaties; the premises and purposes of the two treaties diverge widely. The first U.S.-Japan security treaty was signed on 8 September 1951 in San Francisco on the same day that Japan signed the Treaty of San Francisco (or the Treaty of Peace with Japan), which officially ended the Allied postwar occupation and returned sovereignty to Japan. Under article 1 of the 1951 security treaty, the United States accepted the responsibility to deploy armed forces to Japan to "contribute to the maintenance of international peace and security in the Far East and to the security of Japan." The treaty recognized that Japan was unable to exercise its inherent right of self-defense because of postwar disarmament. The United

States, therefore, was solely responsible for defending Japan from external threats, as well as large-scale riots or internal disturbances, which at the time potentially included action by former imperial military forces.<sup>6</sup>

### *Treaty Obligations*

The second bilateral treaty was signed on 19 January 1960 by Prime Minister Nobusuke Kishi (grandfather of Prime Minister Shinzo Abe) and U.S. Secretary of State Christian A. Herter. This agreement is still in force. The new treaty confirmed that Japan was entitled to the right of self-defense and that the United States and Japan shared a common interest in international peace and the security of the Far East.<sup>7</sup>

This treaty is composed of ten articles that set forth three principal obligations: (1) self-help and mutual aid, (2) mutual defense, and (3) the provision of bases in Japan for U.S. forces. First, article 3 requires the parties to develop and maintain the capacity to resist armed attack, “individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid, subject to their constitutional provisions.”<sup>8</sup> This obligation originally arose from the Vandenberg Resolution, which the U.S. Congress passed in June 1948. Senator Arthur H. Vandenberg (R-MI) crafted the resolution as the United States was joining the North Atlantic Treaty Organization (NATO), to clarify U.S. security policy. The resolution insisted on incorporation of the principle of self-help and mutual aid into the NATO agreement to prevent free riding by European allies, which would impose an excessive burden on the United States. *Self-help and mutual aid* means that “the participants must be prepared fully to carry out their obligations under the Charter [of the United Nations], resolutely to defend their liberties against attack from any source, and efficiently to develop their maximum defense potential by coordination of their military forces.” Therefore, NATO members have an obligation to develop and maintain their defense capabilities, regardless of the effectiveness of the U.S. nuclear umbrella. The resolution was designed to save the Europeans from the moral hazard posed by free and unlimited defense provided by the United States and to insulate the United States from “open ended or unlimited commitments.”<sup>9</sup> This sense also made its way into the U.S.-Japan agreement, and is codified in article 3 as the legal basis for Japan’s defense budget. Japan spends just over 1 percent of its gross domestic product on national defense.<sup>10</sup>

Second, the 1960 treaty commits each state to mutual defense. Article 5 recognizes that an armed attack against either party in “the territories under the administration of Japan” would endanger the security of both parties. Therefore, Japan has a legal obligation to prepare and act to counter threats to territories it governs. The geographic scope of this provision always has included outlying

Japanese territories, such as the Senkaku Islands, as “territories under the administration of Japan.” In 1996, for example, the United States stated explicitly that the bilateral security treaty applies to the Senkaku Islands, and presumably to any other territory under the administration of Japan, such as Okinotorishima.<sup>11</sup> Importantly, however, the treaty does not obligate Japan to exercise mutual defense to protect areas outside its territory or those under its administration.

Third, Japan has a legal obligation to provide bases in Japan for the use of American forces, and it has done so. For example, the U.S. Seventh Fleet flagship, USS *Blue Ridge*, is forward-deployed to Yokosuka, along with Task Force (TF) 70, an aircraft carrier strike group led by USS *Ronald Reagan*, and TF 76, an expeditionary strike group with warships forward-deployed to Sasebo and a headquarters element located at White Beach, Okinawa.<sup>12</sup> Article 6 ensures that U.S. forces may use facilities and training areas in Japan for the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East.<sup>13</sup> This provision provides the legal basis for Japan to grant U.S. forces the use of military facilities and training areas. Rules on the status of U.S. forces in Japan, such as criminal jurisdiction for crimes committed by U.S. servicemembers, fall under a separate agreement, the U.S.-Japan Status of Forces Agreement.<sup>14</sup>

### *The 2015 “Guidelines”*

While the 1960 treaty sets the general terms of the relationship and bilateral obligations, more-detailed policies are contained in the “Guidelines for Japan-U.S. Defense Cooperation.” This document has been formulated three times: in 1978, 1997, and 2015. The latest iteration emphasizes five areas of cooperation: (1) seamless, robust, flexible, and effective bilateral responses; (2) synergy across the two governments’ national security policies; (3) a whole-of-government alliance that leverages interagency coordination; (4) cooperation with regional and other partners, as well as international organizations; and (5) recognition of the global nature of the U.S.-Japan alliance, which produces security benefits that reverberate worldwide. These guidelines were written to be consistent with each nation’s constitution and national laws, as well as international law.<sup>15</sup>

The guidelines are not legally binding, but they contain policy on alliance coordination mechanisms, bilateral planning for contingencies, ballistic-missile defense, cooperation abroad, and cooperation on outer space and cyberspace. The document is critical for shaping Japan’s laws concerning defense cooperation, because it includes some specific goals that are impossible to achieve without progressive legislation. For example, the 2015 iteration states that “the [Japan] Self-Defense Forces [JSDF] and the U.S. Armed Forces will provide mutual protection of each other’s assets, as appropriate, if engaged in activities that contribute to the defense of Japan . . . including during training and exercises.”<sup>16</sup> In response to this

mandate, Japan reformulated the legal basis for the JSDF to protect U.S. weapons and assets in peacetime, a function that earlier laws did not cover.<sup>17</sup>

### PARALLEL APPROACHES TO NATIONAL SECURITY LAW

There are fundamental differences between the American and Japanese approaches to national defense. While the operations of the U.S. armed forces emanate from the executive power in the form of an executive order (EXORD) issued by the Secretary of Defense, the operations of the JSDF flow from the government's administrative actions. For this reason, U.S. military operations are implemented flexibly, whereas JSDF operations require specific statutory authorization.

#### *The President's War Powers*

In the United States, the president exercises the "vast share of responsibility" for the conduct of foreign relations and national security.<sup>18</sup> Article II, Section 1, of the U.S. Constitution states as follows: "The executive Power shall be vested in a President of the United States of America." The president also is designated by Section 2 as commander in chief of the Army and the Navy. These powers allow the president "to direct the movements of the naval and military forces placed by law at his command."<sup>19</sup> This remit includes the authority to direct U.S. military forces in engagements necessary to advance American national interests abroad.<sup>20</sup> Even in the absence of specific prior congressional approval, the president's power to employ military force abroad derives from his constitutional responsibility as commander in chief.

This authority is confirmed by long-standing practice.<sup>21</sup> In defending the authority of President George Washington, for example, to issue the 1793 Neutrality Proclamation during the French Revolution, Alexander Hamilton wrote that the president's "executive power" in Article II of the Constitution and his duty to "take Care that the Laws be faithfully executed" included the power unilaterally to proclaim neutrality in armed conflict.<sup>22</sup> This custom was followed by his contemporaries—Presidents Adams, Jefferson, Madison, and Monroe—and more-recent American leaders have expanded presidential powers even further.

It was when President John Adams was criticized for extraditing Thomas Nash, alias Jonathan Robbins, to Great Britain (to stand trial for a murder committed on a British ship) that John Marshall as a member of the House of Representatives in 1800 argued that the president had the authority to do so because he was the "sole organ" of the nation in foreign affairs.<sup>23</sup> In 1936, the U.S. Supreme Court repeated this characterization of presidential power in *United States v. Curtiss-Wright Export Corp.*<sup>24</sup> In that case, the court ruled that the president has plenary powers in foreign affairs, which has led to the axiom "Curtiss Wright and the president is always right!" The president's virtually unlimited authority in foreign

affairs became an article of faith, with Senator J. William Fulbright stating in 1961 that it was “clear and unalterable” that the president enjoyed “pre-eminent responsibility” in managing U.S. foreign relations.<sup>25</sup> Contemporary presidents have continued to hew to this position. In October 2016, for example, President Barack Obama used his constitutional authority to direct U.S. military strikes against radar facilities in Houthi-controlled territory in Yemen.<sup>26</sup> Likewise, in April 2018 President Donald Trump ordered U.S. forces to attack chemical weapons sites in Syria, without congressional approval.<sup>27</sup> Trump followed up with a strike in Baghdad on 3 January 2020 that killed Qassem Soleimani, commander of the Quds Force of the Islamic Revolutionary Guard Corps.<sup>28</sup>

Efforts by Congress to limit presidential powers have been controversial. The War Powers Act, passed—over President Richard Nixon’s veto—on 7 November 1973, states that the president, as commander in chief, possesses constitutional powers to introduce U.S. armed forces into hostilities or into situations where hostilities are imminent, but only pursuant to one of three conditions: (1) a declaration of war by the U.S. Congress; (2) specific statutory authorization by the U.S. Congress; or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.<sup>29</sup> The act requires the president to consult with Congress before introducing U.S. armed forces into hostilities, and to report such military intervention within forty-eight hours to the Speaker of the House and the President Pro Tempore of the Senate. The president also is required to terminate any employment of the armed forces within sixty days after the report unless the operations are validated through congressional authorization.<sup>30</sup> All U.S. presidents, however, have rejected as unconstitutional this and other attempted congressional limitations on their freedom of action, and the War Powers Act remains contentious. In recent years, the Supreme Court has appeared to defer to the executive power of the president, placing “significant weight” on a division of authority weighted toward the president.<sup>31</sup> Throughout the debates over presidential power, Congress has acquiesced, and the president continues to act unilaterally.<sup>32</sup>

### *The Diet’s Use-of-Force Powers*

The Japanese system is more complicated. While the legal basis for U.S. military operations derives from the executive power of the president, the JSDF may act only pursuant to authorization by the national Diet, Japan’s bicameral legislature. It is unlawful for the prime minister to order a deployment of the JSDF without a specific authorizing law.<sup>33</sup> This arrangement reflects the war-renunciation clause of the constitution (article 9), which reads as follows: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

“In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”<sup>34</sup>

The Japanese government interprets article 9 as banning the maintenance of armed forces whose purpose is to threaten or use force as a means of settling international disputes, but preserving the nation’s inherent right of self-defense. It is constitutional for Japan to maintain the JSDF, to the minimum extent required to ensure self-defense.<sup>35</sup> Because the constitution does not permit maintaining armed forces and a war potential, it does not specify or provide for command and control (C2) of operations of the armed forces. There is no executive power or authority analogous to that of the commander in chief, so C2 functions are based on article 72 of the constitution, which states that the prime minister represents the cabinet and submits bills to the Diet for the “exercise of control and supervision over various administrative branches.”<sup>36</sup> Consequently, C2 of the JSDF is conducted through administrative orders to a general administrative branch, on the basis of existing laws.<sup>37</sup> In sum, this unique constitutional framework means that Japan must contend with any armed attack, or the threat of an armed attack, through the nation’s emergency-management apparatus and administrative control process. Unlike the U.S. Constitution, the Japanese constitution does not confer executive power on a single political leader.

#### NATIONAL SELF-DEFENSE IN RESPONSE TO ARMED ATTACK

Article 2(4) of the Charter of the United Nations prohibits the threat or use of force in international relations. The inherent right of individual and collective self-defense is reflected in article 51, and may be invoked “if *armed attack* occurs.”<sup>38</sup> The meaning of *armed attack* as a matter of international law is debatable.<sup>39</sup> In the 1980s-era case between Nicaragua and the United States (referred to as the Paramilitary Activities Case), the International Court of Justice (ICJ) distinguished the most grave forms of the use of force from other, less grave forms. Only the former constitute an *armed attack* and therefore are subject to action in self-defense.<sup>40</sup> Consequently, the ICJ and most scholars suggest there lies a gap between an unlawful use of force in article 2(4) and the right of self-defense against an armed attack in article 51.<sup>41</sup> On the basis of the Paramilitary Activities decision, Japan believes that the gap theory accurately describes the test for the lawful exercise of self-defense in international law. The United States, in contrast, has rejected the idea of a gap, and reserves the right to use force in self-defense even against less grave forms of aggression.<sup>42</sup> In the American view, the United States may respond with force against a hostile act or demonstration of hostile intent if it believes it constitutes an armed attack.<sup>43</sup>

In addition to the difference of interpretation of an *armed attack*, there is a difference between Japan and the United States in the process that triggers the right of self-defense. While the U.S. president can deploy and tactically maneuver U.S. armed forces through an EXORD issued by the Secretary of Defense at any time before, during, or after a crisis or armed attack, Japan must obtain a cabinet decision and Diet approval to conduct such operations.

#### *The U.S. AUMF and Executive Orders*

The United States recognizes three circumstances in which states may employ military force in international politics. First, states may use force pursuant to the authority of the UN Security Council, acting under the authority of chapter VII of the UN Charter. Second, force may be used in self-defense, in accordance with article 51; but again, the United States takes a rather elastic view that most states do not share. And third, force may be used with the consent of the territorial state in which force is exercised, such as when a state requests assistance in suppressing a rebellion.<sup>44</sup> Regardless of which basis is invoked, for the United States the use of force overseas must satisfy at least one of two legal conditions: congressional approval of the use of force, typically through an authorization for use of military force (AUMF); or presidential action under his own authority.

An example of the first case occurred when, shortly after the 9/11 attacks, Congress passed an AUMF that authorized the president to use “all necessary and appropriate force” against nations and terrorist organizations that had conducted the attacks and those who aided them in doing so or harbored them.<sup>45</sup> Presidents Obama and Trump relied on this AUMF as the legal basis for conducting military operations in Afghanistan, Iraq, Jordan, Lebanon, Syria, and Yemen, and in East Africa and Libya.<sup>46</sup> In the second case, the president may use force unilaterally, regardless of authorization from Congress, pursuant to his power as commander in chief. Examples include the bombing in Libya (1986); the intervention in Panama (1989); troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004); air patrols and air strikes in Bosnia (1993–95); and a bombing campaign in Yugoslavia (1999).<sup>47</sup> In short, the United States relies on presidential action, albeit sometimes in parallel with specific congressional authorization. Congress has attempted to limit this second type of military operations under the aforementioned War Powers Act.

#### *Japan’s Three Principles and Three Situations*

Because of its constitution, Japan operates within a restrictive national defense policy. Generally, force may be employed only in the event of an *armed attack*—as the Nicaragua decision has shaped that term—and then using only the minimum force necessary. The United States, in contrast, holds that it may use force to repel all illegal threats to the nation or U.S. forces.<sup>48</sup> Importantly, Japan defines *armed*

*attack* strictly as the “organized and premeditated use of force against Japan.”<sup>49</sup> The criteria “organized” and “premeditated” are not perfunctory and must be satisfied; sporadic and occasional combat or accidental or unauthorized action by foreign armed forces may not always constitute armed attack, in the Japanese view. Japan must assess whether an attacker had a clear intention to attack before it makes a determination that the aggressor actually conducted an armed attack. Consequently, Japan maintains only limited military capabilities necessary for minimum self-defense.

Three principles clarify the meaning of *minimum self-defense* in Japan. First, a minimum level of force may be used in self-defense to resist an armed attack against Japan once it occurs, or when an armed attack against a foreign country that is in a close relationship with Japan occurs, and as a result threatens Japan’s survival and poses a clear danger that might fundamentally overturn the Japanese people’s right to life, liberty, and the pursuit of happiness. The principle that Japan can use force in self-defense in the face of an armed attack against a “country in a close relationship with Japan” clearly references the United States. Second, a minimum level of force may be employed in self-defense when there is no other appropriate means available to repel an attack and such force is necessary to ensure the survival of the nation of Japan and protect its people. Third, when force is used it must be the minimum necessary to defend Japan or another country in a close relationship with Japan.<sup>50</sup>

The JSDF will use force for self-defense when an armed attack against Japan occurs, but Japan may exercise the right of self-defense only in special or designated situations, and with the approval of the Diet. The three types of situations, or specific scenarios, are (1) an *anticipated armed-attack situation*; (2) an *armed-attack situation*; and (3) a *survival-threatening situation*. There is no lawful basis for the JSDF to mobilize and use force unless the Diet declares one of these situations to exist.

***Anticipated Armed-Attack Situation.*** Japan lawfully may deploy JSDF units when an armed attack has yet to occur but threatening circumstances are alarming and a future armed attack is anticipated.<sup>51</sup> Although in this circumstance an attack is said to be *anticipated*, that term differs from the idea in the international law of *jus ad bellum* that states may use force in “anticipatory self-defense” to strike against a gathering threat.<sup>52</sup> The theory of anticipatory self-defense is based on the response of a state facing a threat, when the aggressor has taken concrete steps toward the initiation of an attack, thereby justifying the exercise of the right of self-defense on the part of the defending state. By contrast, in the case of anticipated armed-attack situations, armed aggression is expected, but the aggressor has not taken any tangible steps toward conducting an attack. The government of

Japan determines the existence of an *anticipated armed-attack situation* through a cabinet decision, with approval by the Diet.<sup>53</sup>

In such a case, the JSDF can redeploy self-defense forces to new locations and order them to execute duties as a legal obligation to ready the force to act immediately should an armed attack occur.<sup>54</sup> Under this legal authority, the JSDF also may construct facilities for operations in the planned area to prepare to counter an attack, and it may provide logistics support for U.S. armed forces that would be responding to the armed attack, in accordance with the current U.S.-Japan security treaty. Examples of support the JSDF may provide to U.S. forces include supplies; transportation; communications; military repair, depot, and maintenance facilities; medical services; construction and operation of seaports and airports; and access to military bases for accommodations, storage, facilities, and training.<sup>55</sup> The JSDF even may supply ammunition to U.S. forces, but it cannot deliver missiles, mines, torpedoes, nuclear warheads, chaff, or chemical weapons.<sup>56</sup> Under this scenario, the JSDF also may recall reserve personnel to active duty.<sup>57</sup>

***Armed-Attack Situation.*** In this second situation a foreign power has conducted an armed attack against Japan or there is an imminent danger of such an attack. Assessment of this situation is performed ad hoc. The government then promulgates what is called a “basic response plan,” which requires a cabinet decision and Diet approval.<sup>58</sup> After such approval, the prime minister may order the JSDF to conduct a *defense operation*, which may include the use of force.<sup>59</sup> Under article 88 of the JSDF law, in this situation the JSDF may employ “necessary force to defend [the] country.” Although Diet determination of the basic response plan—which includes recognition of the existence of an armed-attack situation and the intended response to it—normally is a precondition for the use of force, in an emergency the prime minister can ask for Diet approval after the operation already has been ordered.<sup>60</sup>

Under the order of a defense operation, the JSDF acquires additional authorities besides the use of force. For example, the minister of defense can exercise C2 of Japan Coast Guard (JCG) forces as part of the national response. The JSDF can requisition hospitals, vehicle maintenance facilities, shipyards, and port facilities, and even may seize private property and homes.<sup>61</sup> Further, to prevent a neutral state’s vessels from transporting foreign military supplies (limited war contraband, such as weapons or ammunition) toward enemy states in an area where an armed attack against Japan is occurring, the JSDF can conduct naval operations to control and interdict international shipping, including directing foreign-flagged vessels into port for inspection.<sup>62</sup> Such an operation is distinct from the peacetime right of approach and visit.<sup>63</sup> It also is somewhat different from the

belligerent right of visit and search during time of war, since an inspection team conducting a boarding during a defense operation is not authorized to destroy a ship carrying contraband goods.<sup>64</sup>

*Survival-Threatening Situation for Collective Self-defense.* This third scenario involves collective self-defense, of a sort.<sup>65</sup> From the institution of the first bilateral security treaty until 2015, Japan held the position that the bar for exercise of the right of collective self-defense is higher than the threshold for the minimum exercise of self-defense. The latter is permitted by the constitution, whereas Japan possesses the right of collective self-defense as a matter of international law.<sup>66</sup> On 19 September 2015, Japanese prime minister Shinzo Abe and the ruling Liberal Democratic Party passed new legislation that reinterpreted the Japanese constitution to permit certain carefully prescribed operations for collective self-defense. The new law entered into force on 29 March 2016.

A survival-threatening situation for collective self-defense exists after an armed attack occurs against a foreign country that is in a close relationship with Japan, and as a result Japan's survival is threatened. While the Japanese government has not clarified the specific application of this provision, generally this concept envisions an attack against the United States or U.S. forces.<sup>67</sup> Such an attack would be regarded as posing a clear danger to Japan, with the potential fundamentally to overturn the rights of the Japanese people to life, liberty, and the pursuit of happiness. This new approach was explained in a cabinet decision as follows:

[A]s a result of careful examination in light of the current security environment, the Government has reached a conclusion that not only when an armed attack against Japan occurs but also when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to overturn in a fundamental way people's right to life, liberty, and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date.<sup>68</sup>

The cabinet must certify that these conditions exist and gain Diet approval to formulate a basic response plan.<sup>69</sup> Unlike emergency circumstances that give rise to the *armed-attack situation*, the cabinet decision and Diet approval for the *survival-threatening situation* of collective self-defense may not be made after the assessment; however, the prime minister may order a defense operation, under which the JSDF can exercise the use of force.<sup>70</sup> This approach reflects the right of collective self-defense in international law.<sup>71</sup> In Japan's case, however, the JSDF's

exercise of collective self-defense is limited to situations in which Japan's survival is threatened, and the sole purpose is to protect Japan.<sup>72</sup>

More broadly, even though collective self-defense is recognized as a principle of international law, Japan cannot exercise its full scale or scope because of its constitutional limitations. For example, although the Gulf War was conducted under the auspices of the UN Security Council as a lawful operation in collective self-defense, Japan could not participate in large-scale air strikes or take actions against enemy forces, because such engagement in hostilities would have been deemed unconstitutional, since the operations did not bear directly on the survival of Japan.<sup>73</sup>

### TACTICAL SITUATIONS SHORT OF WAR

Japanese law does not provide authority to act in tactical situations short of war. Yoram Dinstein refers to *operations short of war* as tactical, small-scale, armed attacks in situ, and the employment of counterforce in defense.<sup>74</sup> For the United States, such situations may exist even when there is neither a specific AUMF nor an executive order authorizing actions in response to small-scale armed attack; the president acts pursuant to his powers as commander in chief. Under such circumstances, while U.S. forces confronting these limited attacks may exercise individual or unit self-defense, the JSDF responds in accordance with laws that permit the use of weapons, since none of the three situations discussed previously provides authority to act in such scenarios. The statutes that authorize use of weapons are law-enforcement statutes; they include the Law for Protection of SDF's Weapons and Other Equipment, the Law for Protection of the Weapons and Other Equipment of the Units of the U.S. Forces and the Armed Forces of Other Countries, and the Law for Guarding Facilities.<sup>75</sup>

First we will describe the U.S. approach, then contrast it with that of Japan. The U.S. system is simpler and more flexible than Japan's.

#### *U.S. Rules of Engagement for Unit Self-defense*

The U.S. decision-making system employs a flexible approach to responding to low-level attacks. American commanders have a right—indeed, an obligation—to protect their units from any threats by exercising unit self-defense. The U.S. *Standing Rules of Engagement*, for example, states as follows:

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless a unit commander directs otherwise, as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense include defense of other U.S. military forces in the vicinity.<sup>76</sup>

The exercise of unit self-defense is deemed an expression of the inherent right of national self-defense, as recognized by article 51 of the UN Charter and customary international law. Consequently, unit self-defense is derived from customary international law, and it may be extended to protect units and individuals from other nations, which then would be authorized by the applicable rules of engagement (ROEs).<sup>77</sup>

#### *Law Enforcement and the Use of Weapons by Japan*

In contrast to U.S. practice, the Japanese response applies a law-enforcement approach in all situations short of war. The same cautionary rules for the use of force apply as when responding to the actions of common felons, and other criminal matters. Even though it is the JSDF conducting operations, the legal basis for doing so lies in law enforcement, not national self-defense. This is so mainly owing to Japan's strict definition of *armed attack* and the country's strict procedures for authorizing the use of force. Japan refers to these law-enforcement acts as the *use of weapons*, to distinguish them from the *use of force* under the exercise of the right of self-defense. Since the use of weapons in these situations is deemed to be merely acts of law enforcement, Diet approval is not required. The JSDF has authority to use weapons under this law-enforcement paradigm in three specific situations, as detailed below.

***Protecting JSDF Weapons and Equipment.*** While the JSDF cannot use force except when the prime minister issues a defense operation order on the basis of the existence of certain situations, under certain other conditions it actually may employ weapons to protect JSDF property, including weapons and munitions, ships and aircraft, vehicles, communications equipment, and fuel. Members of the JSDF who are specifically on duty to protect these assets may use weapons to the extent reasonably necessary, in accordance with the requirement of proportionality, under the right of individual self-defense. The situation requires that it be impossible to protect the weapons by other means, such as withdrawal.<sup>78</sup> In Japan's system, such a use of weapons is different from the exercise of self-defense under international law or unit self-defense in the U.S. conception.

The penal code authorizes the exercise of "individual self-defense" and "aversion of a present danger" in cases involving the use of weapons to protect weapons in urgent situations.<sup>79</sup> The JSDF's right to use weapons ceases if the objects whose protection is intended are destroyed completely or the attackers abort the attack and break off contact. That is, the right to use weapons is a rather narrowly construed law-enforcement measure; for instance, it does not even permit pursuit of the attackers. In national self-defense and unit self-defense, defensive action may continue until the threat has disappeared completely, even after the attack is interrupted and the aggressors begin to flee. In the case of a use of weapons, however, defensive rights must be proportional to the threat, narrowly

circumscribed to the immediate zone of attack, and include only limited rights of protection.

*Japan's Use of Weapons to Protect U.S. and Other Foreign Assets.* To protect foreign weapons, equipment, or other assets, the JSDF required additional legal authority. Section 2 of article 95 of the JSDF law authorizes the use of weapons to protect U.S. and other foreign armed forces' weapons and other assets if they actually are engaged in activities that contribute to the defense of Japan in cooperation with the JSDF, including peacetime activities such as joint exercises and training. The use of weapons is authorized only in situations in which reasonable grounds for action exist, and only to the extent reasonably necessary. Importantly, this protection is provided during routine peacetime operations and does not require the Diet to issue a specific national defense authorization on the basis of one of the aforementioned situations.

To distinguish the use of weapons from the use of force by other countries, the JSDF will not conduct this protection in an area of hostilities. Therefore, Japan does not regard this protection as either a use of force or an act of collective self-defense against an armed attack. The use of weapons shall not cause harm to persons, except in a case of individual self-defense or "averting present danger."<sup>80</sup> Furthermore, this option may be exercised only after the JSDF receives a request from U.S. or other foreign armed forces.

*Use of Weapons to Guard Facilities.* Military facilities may be protected by yet a third type of authority for the use of weapons.<sup>81</sup> While every ministry has the administrative right to operate facilities and guard its installations, this authority by itself does not permit the use of lethal weapons to protect them. The JSDF, however, has additional legal authorization, under the statute on guarding facilities, to use weapons to protect its installations.<sup>82</sup>

This law applies only to JSDF facilities in Japan and persons in those facilities, including personnel who are not members of the JSDF, and does not apply to JSDF members outside these facilities. The JSDF personnel assigned to guard or patrol duties on these installations may use weapons when reasonable grounds exist to protect themselves or others, and to the extent reasonably necessary. This law provides law-enforcement authority, and the use of weapons shall not cause harm to persons except for the two exceptions specified in the penal code (self-defense and averting present danger). Likewise, the JSDF must cease its use of weapons if the attackers halt the attack and withdraw.<sup>83</sup>

#### FILLING GAPS IN JAPANESE LAW

While U.S. forces operate flexibly—by executive order, and without considering gaps between the gravest forms of the use of force and other, less grave

forms—Japan requires specific laws that direct the JSDF to conduct operations in response to threats that constitute the gravest forms of the use of force (i.e., armed attack). Japan then is permitted to respond under the right of national self-defense.

Owing to the stricter definition of *armed attack* in Japan, however, the country must consider whether an attack is organized and reflects the belligerent intention of an aggressor state or quasi state (e.g., Hezbollah) to qualify as an armed attack. This threshold is high, and the JSDF may act only under specific laws discussed in the preceding “Tactical Situations Short of War” section on the use of weapons to respond to threats that lie below the threshold of armed attack. This section explores the JSDF laws enacted to fill these gaps in the use-of-force architecture, including maritime-security operations (MSOs) and destruction measures against inbound ballistic missiles.

#### *Maritime Security Operations in Response to Gray-Zone Challenges*

In peacetime, the JCG is responsible for confronting ships that violate Japanese law in the territorial waters of Japan; the JMSDF does not have such authority. However, if the challenge overwhelms the capabilities of the JCG, the JMSDF may respond under provisions providing for the ordering of an MSO.<sup>84</sup>

The JMSDF has authority to conduct MSOs, with this authority deriving from the Coast Guard Law, so the exercise of this authority is deemed to be necessary for law enforcement.<sup>85</sup> Applicable sections of the statute include article 16 (request of cooperation for citizen and ship), article 17 (query, order to submit documents, order to stop ship, and ship visit), and article 18 (measures of displacement, expulsion, takedown, and stopping a vessel). There are three types of MSOs: operations against merchant shipping, operations against foreign warships that have sovereign immunity from Japan’s jurisdiction, and operations against submerged submarines. For example, in November 2004, the JMSDF observed a submerged Chinese nuclear-powered submarine navigating in Japanese territorial waters near the Sakishima Islands. In response, an MSO order was issued and JMSDF warships and aircraft tracked the submarine until it left the territorial sea.<sup>86</sup>

During MSOs of the first type, the JMSDF may take measures against civilian merchant ships to determine whether they are violating Japan’s domestic law, in three circumstances. First, the JMSDF may confirm a violation, at which point it hands the merchant ship off to the JCG, which has judicial authority to investigate and charge suspected criminals. Second, even if a ship has not violated the law, the JMSDF may expel it from Japan’s territorial waters if the vessel is believed to pose a threat to or contribute to a deterioration of public order in the territorial sea.<sup>87</sup> Third, the JMSDF may use weapons against civilian ships if necessary

for unit self-defense and to overcome resistance, but the use of these weapons to harm people is limited to “averting present danger.”<sup>88</sup>

In the three circumstances discussed above, the use of weapons is limited to that extent reasonably necessary in the circumstances. Weapons may be used, for example, if a foreign ship ignores an order to stop or attempts to resist the JMSDF. In such a scenario, the minister of defense must certify that the following four conditions are met: (1) An alleged civilian ship is a foreign-flagged vessel, is conducting noninnocent passage in Japan’s territorial sea, and has no justification for its actions. (2) If the ship is left unchallenged, it is highly likely the harmful conduct will be repeated in the future. (3) There is a suspicion that the presence of the ship is in preparation for conducting some “serious and heinous” (felony) crime. (4) It is impossible to prevent these criminal acts simply by obtaining information from, stopping, and visiting the suspect ship. In addition to the defense minister’s certification, there is an additional condition: (5) The commanding officer of the JMSDF warship must believe there is no alternative to firing at the ship to stop it.<sup>89</sup>

In the second type of MSO, the procedures may be used against a foreign warship that is in the territorial sea but not conducting innocent passage. This application of authority is different from that used against a civilian ship, because a warship has sovereign immunity from foreign jurisdiction. Therefore, the JMSDF may not use force to compel compliance on the part of the foreign warship but instead must request that it comply, requiring it to leave the territorial sea. In such a case, Japan operates in accordance with article 30 of the United Nations Convention on the Law of the Sea (UNCLOS), which requires foreign warships not in innocent passage to “leave the territorial sea immediately.”<sup>90</sup>

In the third type of MSO, submerged submarines operating in Japan’s territorial sea are in violation of innocent passage and pose yet another scenario that requires countermeasures. Under UNCLOS, a foreign submarine in the territorial sea is required to transit on the surface and show its flag.<sup>91</sup> The JCG is not equipped to respond to the threat of submerged submarines, so the JMSDF may conduct MSOs in such circumstances. Although MSOs normally require a cabinet decision and the approval of the prime minister, these formalities are dispensed with in the case of a submerged submarine; the prime minister may approve this type of MSO without awaiting a decision of the cabinet.<sup>92</sup> The JMSDF may track and report underwater contacts until the prime minister issues an MSO, which authorizes the JMSDF to request any submerged submarine to surface. Even if the submarine continues to navigate submerged in the territorial sea, force (the use of weapons) may not be employed to repel it until an MSO is issued.<sup>93</sup>

### *Ballistic-Missile Defense*

Japan and the United States also differ in how they approach authority to conduct ballistic-missile-defense operations. The U.S. president has authority to respond to and destroy inbound ballistic missiles that threaten the United States.<sup>94</sup> In Japan, the JSDF can use force in such a scenario only after the Diet makes the determination of an *armed-attack situation* or *survival-threatening situation* and the prime minister initiates an order for the JSDF to commence defense operations. If a ballistic missile is launched against Japan under this situation, the JSDF has authority to intercept it in flight; however, the elapsed time between the launch of a missile by North Korea and its impact on Japan might be just four minutes, so requiring the procedures discussed above would not be practical.<sup>95</sup> North Korea often has launched ballistic missiles under the guise of placing a satellite into orbit. Given the ambiguity involved in each such launch, Japan's government has no time to approve the determination of an *armed-attack situation* or *survival-threatening situation*, or to deem that the launch constitutes the *gravest form of the use of force*, or to interpret the action as an *armed attack*, any of which could trigger the national right of self-defense.

To address this dilemma, the Japanese government enacted the Law Concerning Destruction Measures against Ballistic Missiles to provide separate legal subauthority to counter the threat of ballistic missiles.<sup>96</sup> This law applies when the intention of the nation launching a rocket into outer space is unknown, the timing of the launch is unknown, and the object to be launched into space is not known but may be harmful if it strikes Japan. Under the category of "destruction measures against ballistic missiles," the JSDF may use advanced weapons for ballistic-missile defense, including the Standard Missile-3s installed on JMSDF Aegis destroyers and ground-based Patriot Advanced Capability-3s. These measures constitute another form of the use of weapons and not the use of force. Ironically, this means that Japan uses what is essentially a law-enforcement authority to respond to time-critical threats from ballistic missiles, rockets for artificial satellites, and other objects in flight (except aircraft) flying toward Japan that may cause serious damage to citizens and properties.<sup>97</sup> Importantly, this law targets only missiles incoming to Japanese territory; it does not cover the interception of ballistic missiles bound for the United States or other countries. While this authority might be used to counter inbound hypersonic glide vehicles, antiballistic-missile technology may be ineffective against them.

### *Public-Security Operations*

In the United States, the National Guard of each state may respond to a collapse of public order or security that police forces cannot handle. In contrast, the Posse Comitatus Act restricts the U.S. Army from engaging in law enforcement within

the United States.<sup>98</sup> But since Japan does not possess a National Guard or an equivalent militia force, the JSDF would respond in such situations.

In Japan, there are two legal bases for the JSDF to conduct operations to secure the public safety. The prime minister, with the consent of the Diet, may order a public-security operation when it is deemed that the public security cannot be maintained by law enforcement alone, including because of indirect aggression, such as an insurgency.<sup>99</sup> The prime minister also may order a public-security operation if a prefectural governor requests such, to maintain the peace in serious situations.<sup>100</sup> In both cases, the JSDF is authorized to exercise police functions and use weapons to prevent, control, and quell riots and to guard high-priority officials, without the necessity to consider questions of self-defense under article 36 or averting present danger under article 37 of the Penal Code, which are beyond the purview of the policy.<sup>101</sup>

#### JAPAN'S CONTRIBUTIONS TO INTERNATIONAL PEACE

While historically the maintenance of international peace, more generally considered, was beyond the purview of the U.S.-Japan alliance, in recent years Japan has taken steps to contribute more fully to global society. Section V.B. of the 2015 "Guidelines" sets forth the global importance of the U.S.-Japan alliance and the need for greater cooperation with regional and other partners.<sup>102</sup> After the 2015 version of "Guidelines" was adopted, Japan enacted several laws to authorize the JSDF to conduct operations related, and contributing more broadly, to the maintenance of international peace and security.

For these purposes, three statutory bases exist. First, Japan may conduct operations to support U.S. forces and those of other foreign countries. Second, the JSDF may initiate maritime operations to enforce UN Security Council sanctions effectively. Third, the JSDF may engage in UN peacekeeping operations (PKOs). When operating under one of these three authorities, the JSDF may be required to comply with special limitations imposed on its operations. To facilitate interoperability, it is imperative for U.S. forces and other partner nations operating with the JSDF to understand the scope of those limitations.

#### *Situations That Influence Japan's Peace and Security*

In limited situations, Japan may support U.S. forces engaged in operations aimed at containing or unwinding local or regional conflicts. Japan's constitution allows the JSDF to operate to promote peace in Japan, so the supported operations must have some nexus to Japan's security. In these operations, the JSDF is permitted to act in situations or scenarios deemed to have an "important influence on Japan's peace and security" but that fall below the threshold of an *armed-attack situation* in national self-defense or a *survival-threatening situation* under collective self-defense. The law defines "situations that influence

Japan's peace and security" as those that, if left unattended, could result in a direct armed attack on Japan, with important consequences for Japan's peace and security. In such situations, the JSDF can support U.S. and other foreign armed forces engaged in operations that contribute to the objectives of the bilateral security treaty and promote the goals of the UN Charter. Importantly, there is no geographic limitation to this authority, so Japan could decide that a situation that occurred outside the region could influence Japan's peace and security, such as a NATO contingency in Europe. The Diet must approve a finding in advance that this type of situation exists, although *ex post facto* approval is allowed in an emergency.<sup>103</sup>

The law to authorize operations in response to "situations that influence Japan's peace and security" covers provision of military logistics, search-and-rescue (SAR) capabilities, ship-inspection operations, and other necessary measures. Japan differentiates ship-inspection operations from maritime-interception operations, as discussed in the next section. The JSDF also may provide supplies; repair and maintenance services; communications; medical services; airport, seaport, and other transportation services; base activities (lodging, storage, and military use of facilities); and training services. While the provision of weapons is not included within the scope of this authority, the supplying of combat-related ammunition and the refueling and maintenance of aircraft are included. These measures may be undertaken in other countries, with the consent of the foreign states involved.<sup>104</sup>

### *Ship-Inspection Operations*

In an *armed-conflict situation*, the JMSDF may conduct the belligerent right of visit and search to determine the character of ships and cargo, locate contraband, and identify potential military targets. Such operations are conducted pursuant to Japan's right to use force in national self-defense. In such cases, Japan also may regulate neutral shipping.<sup>105</sup>

The belligerent right of visit and search during armed conflict at sea is distinguished from peacetime ship-inspection operations (SIOs), which may be conducted to secure effective compliance with economic sanctions. The JMSDF may conduct an SIO under the domestic legal authority of an *important influence situation*, pursuant to the International Peace Support Act and to enforcing UN Security Council resolutions, or through obtaining the consent of the flag state.<sup>106</sup>

Compared with SIOs, maritime-interception operations (MIOs) encompass a broader range of activities at sea, including querying the master of a vessel; ordering it to stop; boarding, inspecting, and searching it; and even seizing the vessel and cargo. In addition to exercising its belligerent rights under the law of naval warfare, Japan may conduct MIOs pursuant to flag-state and master's consent, as

enforcement measures against stateless vessels, when exercising the right of self-defense, and as a condition of port entry.<sup>107</sup> MIOs also may be used to enforce Security Council mandates, including diversion into port for inspection, while SIOs are limited to requesting a change of destination.<sup>108</sup> While in an MIO the firing of warning shots is permitted as a communications signal to a noncompliant vessel, in an SIO warning shots are not permitted. Because MIOs and SIOs are so different, the separate geographic areas in which they apply are specified.

### *Peacekeeping Operations*

Japan has considered deploying JSDF units in support of PKOs to signify that the country has shouldered the role of responsible stakeholder in the community of nations.<sup>109</sup> The JSDF may conduct international peace-cooperation activities not directly related to Japan's security under two laws: the International Peace Cooperation Act (IPCA) and the International Peace Support Act (IPSA). Both require Diet approval, in two-year increments.

The IPCA provides the legal basis for the JSDF to contribute to UN PKOs, international humanitarian-relief operations, and international election observations.<sup>110</sup> When such JSDF deployments are made, they are subject to five conditions: (1) The JSDF will not participate unless an agreement on a cease-fire has been reached among the parties to an armed conflict. (2–3) Consent for the conduct of UN PKOs, as well as Japan's participation in such operations, shall have been obtained from the host country and the parties to the conflict. (4) The operations shall maintain strict impartiality and not favor any of the parties in the conflict. (5) The International Peace Cooperation Corps of Japan may suspend operations if these rules are not followed.<sup>111</sup>

IPCA operations must be based on resolutions of the UN General Assembly, the Security Council, or the Economic and Social Council; or requested by UN organs established by the General Assembly or specialized agencies, funds, and programs, such as the Office of the UN High Commissioner for Refugees; or otherwise specified by an order from the cabinet, regional organizations as prescribed in article 52 of the UN Charter, or organs established by multilateral treaties. The missions must be undertaken at the request of the countries in the area in which they are conducted.<sup>112</sup>

JSDF personnel who are engaged in duties under the IPCA may use their weapons to the extent considered necessary and proper in light of the situation. This standard is determined according to the following formula:

1. When there are reasonable grounds for judging that no appropriate means other than the use of weapons will protect against physical harm or death of (a) themselves (the JSDF personnel in question); (b) other JSDF personnel operating with them; or (c) personnel of Japan's International Peace

Cooperation Corps working in the line of duty or who have come under the protection of JSDF personnel

2. When there are attacks against JSDF personnel jointly stationed with foreign personnel, such as foreign armed forces' units, and there are reasonable grounds for the use of weapons jointly with those foreign personnel to protect their own lives or bodies as well as those of other personnel stationed together
3. With regard to JSDF personnel engaged in so-called safety-ensuring operations and JSDF personnel engaged in *kaketsuke-keigo* operations (the protection of individuals in response to an urgent request), when there are reasonable grounds for determining that there exist no appropriate means of overcoming such situations except for the use of weapons to protect their own lives, bodies, or assets or those of other individuals, or to eliminate actions that obstruct their duties<sup>113</sup>

The use of weapons under the IPCA shall not cause harm to persons except for cases falling under article 36 (individual self-defense) or article 37 (averting present danger) of the Penal Code of Japan.

The IPSA provides a second legal basis for the JSDF to participate in international-cooperation activities.<sup>114</sup> While the IPCA covers PKOs, the IPSA covers logistics support, SAR activities, and SIOs. These operations may be conducted in accordance with resolutions of the UN General Assembly or Security Council. Since such operations, as conducted by the JSDF, do not constitute an exercise of the right of collective self-defense, deployed units must avoid integration with the operations of the armed forces of foreign states during this type of mission.<sup>115</sup> Therefore, the JSDF does not conduct such support activities in combat zones.

Use of weapons under the IPSA is more limited than under the rules set forth in the IPCA. While the rules for the use of weapons are similar under the two statutes, under the IPSA safety-ensuring operations and *kaketsuke-keigo* are not authorized. In the event of an attack within a military installation or camp, JSDF personnel may use weapons when there are no alternative locations within the vicinity to ensure the safety of JSDF units and other personnel. As with the IPCA, the use of weapons pursuant to the IPSA shall not cause harm to persons except for cases falling under article 36 (individual self-defense) or article 37 (averting present danger) of the Penal Code of Japan.

The bilateral U.S.-Japan security partnership is the most important alliance in the most important part of the world. It upholds the values that undergird international peace and stability in East Asia. The two powerful democracies, however, operate within distinct national legal systems and their interpretations

of international law sometimes differ. The U.S. Constitution affords the president virtually unlimited authority to respond to foreign threats, deploy forces, and use force to defend U.S. interests, whereas the prime minister of Japan typically must seek a specific legal basis for every JSDF action. The Japanese approach requires time to coordinate the action with the Diet and gain the approval of key lawmakers, which opens a vulnerability that an adversary might exploit during a time of crisis. While Japan may exercise the right of collective self-defense in limited situations—when faced with existential threats to its security—without first going through the Diet, the American approach is much less restrictive.

Compared with the United States, Japan defines *armed attack* and *use of force* more strictly. It allows the JSDF to use force, but in narrowly prescribed situations, and then only after adhering to strict intergovernmental processes. Japan also recognizes a gap between an armed attack and the right of self-defense in international law, while the United States does not. The United States, therefore, may resort to the use of force against a hostile act or even a demonstration of hostile intent. These differences in interpretations of international law and constitutional structures have produced distinct legislation and authority for the JSDF and U.S. armed forces.

The current security environment is most likely to highlight these differences in three situations. First, the role of the U.S.-Japan alliance is changing from one focused purely on defense of Japan toward an alliance that contributes more broadly to international peace and security in East Asia. The 2015 U.S.-Japan *Guidelines*, for example, have embraced this broader vision and make it clear that the alliance is important for regional security and the protection of the global commons. Because of this shift, the JSDF will be required to conduct combined operations with U.S. forces in a manner not contemplated in the 1950s or '60s. On such occasions, the two countries' distinct interpretations of international law and their different ROEs will have to be integrated into operational force planning.

Second, the United States and Japan are encountering gray-zone challenges that add an additional layer of complexity, as they fall between clearly articulated legal doctrines of peacetime law enforcement and the use of force during armed conflict. For Japan, Chinese encroachment on the Senkaku Islands is the greatest among these threats. With regard to Japan's legal system, the concept of the gray zone encompasses scenarios that arise before the Diet makes the determination of an *armed-attack situation*, which means the JSDF cannot use force in national self-defense; instead, Japan must respond to such situations by applying law-enforcement rules on the use of force, which include restriction of the use of force to that necessary and reasonable under the circumstances, and only as a last resort.

The United States and Japan will act jointly in a global commons that is threatened by states' use of advanced technology to weaken the bilateral alliance. Threats in the cyber domain and outer space can keep the two allies off balance and confused, while the conventional land, air, and sea domains are affected by disruptive new methods and means of war that upset traditional legal paradigms, such as unmanned systems and artificial intelligence. While states and scholars grapple with these emerging threats through efforts such as the *Tallinn Manual* in cyberspace and the forthcoming *Woomera Manual* in outer space, the JSDF and U.S. armed forces can gain an edge by ensuring greater interoperability and synchronizing their understanding of the law of naval operations.<sup>116</sup> The revision of the *San Remo Manual* also is indicative of emerging threats, such as autonomous, distributed naval forces, and the Japan Maritime Command and Staff College and the U.S. Naval War College have aligned their efforts in this regard.<sup>117</sup> Given the difficulty in obtaining agreement on international law in these areas, the United States and Japan can serve as thought leaders to shape the progressive development of international law.

Although the two allies share similar values favoring a free and open international order, their histories, cultures, and political systems diverge. The differences do not affect the importance of the U.S.-Japan alliance or its commitment to respond to security threats large and small. Therefore, the allies should invest more effort into improving legal interoperability and ensuring synchronization of integrated operational force planning, to be better positioned to respond to contingencies arising in East Asia. This article provides a point of departure to achieve greater alliance cohesion.

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#### NOTES

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  39. For example, at the section titled “When Does an Armed Attack Occur?” Dinstein introduced three comments, two restricting the definition of an *armed attack* and one expanding it. See Yoram Dinstein, *War, Aggression and Self-defence*, 6th ed. (Cambridge, U.K.: Cambridge Univ. Press, 2017), p. 208.
  40. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).
  41. See Dinstein, *War, Aggression and Self-defence*, p. 206, and Oliver Dörr and Albrecht Randelzhofer, *The Charter of the United Nations: A Commentary*, ed. Bruno Simma et al., 3rd ed. (Oxford, U.K.: Oxford Univ. Press, 2012), p. 1394.
  42. Office of the General Counsel, U.S. Defense Dept. [hereafter DoD OGC], *Law of War Manual* (rev. ed., December 2016), p. 46, ¶ 1.11.5.2.
  43. Chairman, Joint Chiefs of Staff (CJCS), *Standing Rules of Engagement for U.S. Forces / Standing Rules for the Use of Force for U.S. Forces*, CJCSI 3121.01B (Washington, DC: 13 June 2005), p. 2.
  44. *Report on the Legal and Policy Frameworks*, p. 8.
  45. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).
  46. The President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 6 June 2017, available at [www.whitehouse.gov/](http://www.whitehouse.gov/).
  47. *Report on the Legal and Policy Frameworks*, pp. 7, 51.
  48. DoD OGC, *Law of War Manual*, p. 46, ¶ 1.11.5.2.
  49. Prime Minister Junichiro Koizumi, *Shuugiin Giin Kaneda Seiichi-kun Teishutsu Buryoku Kougeki Jitai ni kansuru Shitumonsho ni taisuru Toubensho* [Reply to the questions concerning an armed attack submitted by Seiichi Kaneda, a member of the House of Representatives], 24 May 2003, available at [www.shugiin.go.jp/](http://www.shugiin.go.jp/).
  50. *Defense of Japan 2016*, p. 166.
  51. Law No. 79 of 2003, art. 2(3). The English translation in *Defense of Japan 2016*, p. 213, is Law for Ensuring Peace and Independence of Japan and Security of the State and the People in Armed Attack Situations, etc., and Survival Threatening Situation (hereafter cited as AAS/STSR Act).
  52. Dinstein, *War, Aggression and Self-defence*, pp. 222–23.
  53. AAS/STSR Act, art. 9.
  54. SDF Law, art. 77(2).
  55. U.S. Military Actions Related Measures Act, Law No. 113 of 2004, art. 10(4).
  56. Agreement Concerning Reciprocal Provision of Logistic Support, Supplies, and Services, with annexes, Japan-U.S. art. 3, 26 September 2016.
  57. SDF Law, art. 70(1).
  58. AAS/STSR Act, art. 9.
  59. SDF Law, art. 76.
  60. AAS/STSR Act, art. 9(4)2.
  61. *Ibid.*, arts. 80, 103.
  62. Maritime Transportation Restriction Act, Law No. 116 of 2004. As a matter of law, Japan separates ship visits against military targets to be carried out as part of the use of force from ship inspection of neutral ships as an exercise of the belligerent right of visit and search to determine any enemy character of the cargo. The authorities in the Maritime Transportation Restriction Act are not based in article 88 of the SDF Act’s authorization of the use of force.
  63. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 [hereafter UNCLOS], art. 110.
  64. “Visit and Search,” chap. 1 in *International Law Documents 1943*, ed. Payson S. Wild Jr. (Newport, RI: U.S. Naval War College, 1945).

65. Prime Minister Shinzo Abe, *Shuugiin Giin Fujisue Kenzo-kun Teishutu Sonritukikijitai to Shuudan Anzenhoshou no Kanei ni kansuru Shitumonsho ni taisuru Toubensho* [Reply to the questions concerning relation between survival-threatening situation and collective security], 15 September 2015, available at [www.shugiin.go.jp/](http://www.shugiin.go.jp/).
66. Prime Minister Zenko Suzuki, *Shuugiin Giin Inaba Seiichi-kun Teishutsu Kenpou Kokusaihou to Shuudanteki-Jieiken ni kansuru Shitumonsho ni taisuru Toubensho* [Reply to the questions concerning constitution, international law, and rights of collective self-defense, submitted by Seiichi Inaba, a member of the House of Representatives], 29 May 1981, available at [www.shugiin.go.jp/](http://www.shugiin.go.jp/).
67. Special Committee of the House of Councillors on the Bill for Peace and Security of Japan and International Community, 189th Diet Sess., 1 June 2015 (remarks of Shinzo Abe, Prime Minister) (Japan).
68. Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect Its People (provisional translation), 1 July 2014, available at [www.mofa.go.jp/](http://www.mofa.go.jp/).
69. AAS/STSR Act, art. 2(3).
70. *Ibid.*, art. 3.
71. Dinstein, *War, Aggression and Self-defence*, p. 303.
72. *Defense of Japan 2016*, p. 209.
73. Special Committee of the House of Councillors on the Bill for Peace and Security of Japan and the International Community, 189th Diet Sess., 27 May 2015 (remarks of Shinzo Abe, Prime Minister) (Japan).
74. Dinstein, *War, Aggression and Self-defence*, p. 261.
75. SDF Law, arts. 95, 95(2), and 95(3).
76. CJCS, *Standing Rules of Engagement*, p. 2.
77. Dinstein, *War, Aggression and Self-defence*, p. 262.
78. SDF Law, art. 95(1).
79. Penal Code, arts. 36–37.
80. *Ibid.*
81. SDF Law, art. 95(3).
82. *Ibid.*, art. 91(2).
83. *Ibid.*
84. *Ibid.*, art. 82.
85. *Ibid.*, art. 93.
86. *Defense of Japan 2016*, p. 287.
87. Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters, Law No. 64 of 2008, art. 8.
88. Police Official Duties Execution Act, Law No. 136 of 1948, art. 7.
89. SDF Law, art. 93(3).
90. UNCLOS, arts. 30, 32, 95. Article 30 states: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."
91. *Ibid.*, art. 20.
92. Cabinet Decision on Measures against Submarines Submerging within Japanese Territorial Water (provisional translation), 24 December 1996.
93. *Ibid.*
94. H.R.J. Res. 542, 93rd Cong. § 2(c) (1973).
95. Chris Morris, "North Korea Missile: How Long Has Japan Got to Defend Itself?," *BBC News*, 15 September 2017, [www.bbc.com/](http://www.bbc.com/).
96. SDF Law, art. 82(3).
97. *Ibid.*
98. Posse Comitatus Act, 18 U.S.C. § 1385 (1878).
99. SDF Law, art. 78.
100. *Ibid.*, art. 81.
101. *Ibid.*, art. 90.
102. "2015 Guidelines."
103. Law No. 60 of 1999.
104. *Ibid.*, art. 2(4).
105. Law Concerning Restriction of Maritime Transportation of Foreign Military Supplies, etc., in the Armed Attack Situation and Survival-Threatening Situation (provisional translation), Law No. 116 of 2004.
106. Law Concerning Ship Inspection Operation in the Important Influence Situation, etc., Law No. 45 of 2000.

107. U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M / MCTP 11-10B / COMDTPUB P5800.7A (August 2017), pp. 4-6 to 4-8. See James Kraska, "Broken Taillight at Sea," *Ocean & Coastal Law Journal* 16 (2010-11), p. 1.
108. Some operations used warning shots and boarding of noncompliant ships by helicopter. See U.S. Defense Dept., *Conduct of the Persian Gulf War: Final Report to Congress* (Washington, DC: April 1992), p. 74.
109. In 1992, the JMSDF conducted its first PKO, in Cambodia. The first JMSDF deployment abroad had occurred the year before, when JMSDF vessels conducted minesweeping patrols in the Persian Gulf.
110. Law No. 79 of 1992 [referred to as the Peacekeeping Operations (PKO) Law].
111. *Ibid.*, art. 6.
112. *Ibid.*, art. 6(1).
113. *Safety-ensuring operations* include monitoring, stationing, patrolling, and inspecting at checkpoints, as well as security escort and protection for the purpose of maintaining the safety of specified areas, including prevention and suppression of injury to or harm against local populations, afflicted persons, and others requiring protection.
114. Law No. 77 of 2015 [IPSA].
115. *Defense of Japan 2016*, p. 222.
116. Michael N. Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed. (Cambridge, U.K.: Cambridge Univ. Press, 2017). The Woomera Manual project aims to develop a manual that objectively articulates and clarifies existing international law applicable to military space operations. The project is scheduled to complete the *Woomera Manual* by 2021. "The Woomera Manual," *University of Adelaide*, [law.adelaide.edu.au/](http://law.adelaide.edu.au/). (Disclosure: the Stockton Center for International Law is a sponsor of the Woomera project.)
117. Louise-Doswald Beck, ed., *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, U.K.: Cambridge Univ. Press, 1994). The Operational Law Office of the Japan Maritime Command and Staff College and the Stockton Center for International Law are represented in the International Group of Experts that is revising the *San Remo Manual*.