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Islands in the Sun: Lawfare and Great-Power Competition in the Indo-Pacific

Clayton T. Russo

Missouri State University, Russo4909@live.missouristate.edu

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**ISLANDS IN THE SUN: LAWFARE AND GREAT-POWER COMPETITION IN THE
INDO-PACIFIC**

A Master's Thesis

Presented to

The Graduate College of

Missouri State University

In Partial Fulfillment

Of the Requirements for the Degree

Master of Science, Defense and Strategic Studies

By

Clayton T. Russo

December 2021

ISLANDS IN THE SUN: LAWFARE AND GREAT-POWER COMPETITION IN THE INDO-PACIFIC

Defense and Strategic Studies

Missouri State University, December 2021

Master of Science

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ABSTRACT

This thesis examines the U.S.-Japan Mutual Defense Treaty and its future considering the recent developments in the international security environment. The 2018 National Defense Strategy brought back an emphasis on Great Power Competition, fundamentally transforming the role of U.S. alliances to address new challenges. In the 2021 budget, the Pacific Deterrence Initiative (PDI) has prioritized the People's Republic of China as the number one pacing threat to the United States, drastically shifting international focus away from the Middle East and towards East Asia. In conjunction with funding new capabilities through the PDI, the U.S. will need to conceive new legal doctrines to govern how it competes in this new strategic environment. The rise of gray zone activities, competition that occurs in between the traditional binary of war and peace, has elevated the significance of the laws governing military operations. China in particular has been refining its gray zone capabilities in the East and South China Seas, creating new military, political, and economic challenges for the U.S. and Japan. Addressing these challenges will be critical in managing conflict, deterring adversaries, and establishing nuclear stability in the Indo-Pacific.

KEYWORDS: Japan, international law, Okinotori, gray zone, long-range strike, use of force, freedom of navigation

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Approved:

John Rose, Ph.D., Thesis Committee Chair

Robert Joseph, Ph.D., Committee Member

Ilan Berman, J.D., Committee Member

Julie Masterson, Ph.D., Dean of the Graduate College

In the interest of academic freedom and the principle of free speech, approval of this thesis indicates the format is acceptable and meets the academic criteria for the discipline as determined by the faculty that constitute the thesis committee. The content and views expressed in this thesis are those of the student-scholar and are not endorsed by Missouri State University, its Graduate College, or its employees.

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INTRODUCTION

Many changes have occurred since Japan's constitution came into effect on May 3, 1947, in which Article 9 renounced the use of war as a political means and declared that Japan would aspire towards "an international peace based on justice and order."¹ Perhaps the largest of these changes has been the rise of China. Many in the United States believed that as China grew stronger economically it would assimilate into the global order and play by the liberal rules of the road. However, amidst growing nuclear modernization and expansion, territorial expansionism, economic coercion, as well as human rights violations on a massive scale, this vision of a peaceful rise has functionally dissipated from U.S. political discourse. The 2018 National Defense strategy was the first formal articulation of a serious concern over Chinese military and defense advancements. This was expressed in what was termed a great power competition between China, Russia and the United States. While Russia is often regarded as a greater threat in the short-term, China would be the pacing threat that the U.S. would have to develop a long-term strategy to address.²

While the U.S. arguably still possesses the world's most powerful military in terms of capability, one of its greatest strategic assets has been its alliance network.³ With China set to be the pacing threat, Japan, one of the U.S.'s most important allies in Asia, will be a critical actor in shaping the competition environment. The U.S.-Japan Mutual Defense Treaty (MDT) is one of the U.S.'s longest lasting defense treaties, and for over half a century has served as a core element of strategic stability in the Asian theater. With technology advancing faster than ever

¹ The Japanese Prime Minister and His Cabinet *The Constitution of Japan*, November 3rd, 1946, p. 2.

² U.S. Department of Defense. *Summary of the 2018 National Defense Strategy*, January 19, 2018, p. 1.

³ P. Koronka, "The 20 Most Powerful Military Forces in the World", *Newsweek*, Aug. 24, 2021.

before, the threats the U.S.-Japan alliance faces have also been evolving. New capabilities and new operations will challenge the alliance as never before.

One of these challenges will be the increasing use of lawfare, or the use of law as a weapon of conflict to achieve institutional objectives.⁴ In many instances technology has outpaced the legal architectures means to govern it, and security affairs in Asia are no different. Two specific doctrines that have come under intense scrutiny as geopolitical competition begins to shape the threat environment are the United Nations Convention on the Law of the Sea (UNCLOS) and the UN Charter on the use of force. How these doctrines apply and evolve with the changing security environment will have immense consequences for the security of both the U.S. and Japan. Formulating strategies for addressing current legal disputes while maintaining a credible deterrent capability will be essential to U.S. objectives.

The thesis of this paper is that the United States should revise the U.S.-Japan Mutual Defense Treaty to synchronize U.S. and Japan legal doctrines for military operations and bring them into accordance with international law.

By drawing upon various legal and strategic research, this paper will use a doctrinal method to evaluate various propositions to current laws governing U.S. security affairs in Asia. This thesis will specifically draw upon legal precedents from both the United Nations Convention on the Law of the Sea (UNCLOS) and the UN Charter, as well as various interpretations of those doctrines from both U.S., Japanese, and Chinese officials. It will then examine how these legal precedents currently match up with U.S. and Japanese defense policy and make recommendations based on analytical analysis of their application.

⁴ B. Wittes, “About Lawfare: A Brief History of the Term and the Site”, *Lawfare*, n.d.

Chapter 1 of this thesis will provide historical background information on the U.S.-Japan alliance that is important for an understanding of the challenges the alliance faces today. This thesis will then be divided into two sections to examine two crucial legal challenges the alliance faces. The first will examine international law as it pertains to UNCLOS. Chapter 2 will examine the test case of the Okinotori islands and the legal challenges the U.S. and Japan face as a result of Japan's claim to their sovereignty. Chapters 3 & 4 will then evaluate the costs and benefits of courses of actions the U.S. and Japan can take regarding Okinotori. Part 2 of this thesis will then shift to examine the role that the international laws of war play in the U.S.-Japan alliance. Chapter 5 will detail how Japan's interpretation of the laws of war have evolved with changes in the security environment. Chapter 6 will provide a broader background on international law and the use of force, as well as background on the U.S. doctrine. Chapter 7 will explore how Japan's doctrine of Senshu Boei, or exclusive defensive self-defense faces challenges with the growing emphasis by China on gray zone competition in East Asia. Chapter 8 will articulate how the legal challenges currently faced by the U.S. and Japan can be addressed with modification in the U.S.-Japan Mutual Defense Treaty. Chapter 9 will consider how changes in the U.S.-Japan alliance will affect Japan's broader role in the regional security environment. Chapter 10 will assess whether these changes are desirable. Chapter 11 will close with recommendations for U.S. policy.

CHAPTER 1: BACKGROUND ON THE U.S.-JAPAN ALLIANCE

The origins U.S.-Japan alliance took place in the years following World War II, when the U.S. was designing an alliance framework to combat the rise of Soviet Communism that occurred shortly after the war. At the time Japan was occupied by U.S. troops to prevent a resurgence of fascist leadership, which coincided with several political and economic reforms, leading Japan on the path of democracy and free-market capitalism.⁵ Japanese Prime Minister Shigeru Yoshida was a champion of these reforms, focusing on liberalizing the economy, implementing worker training programs to increase labor productivity, and aligning Japanese security interests with that of the United States. These reforms eventually became known as the Yoshida doctrine and are largely responsible for the economic growth and political rise of Japan for the next half century.⁶

Despite the success of these reforms, anti-U.S. sentiment was still high in the country, particularly as a result of the continued U.S. military occupation of Japan. Sensing the importance of maintaining Japan as an ally in East Asia in the new containment strategy against Russia, the U.S. sought to resolve differences with an official alliance agreement. On September 8th, 1951, the U.S. and Japan signed the San Francisco Peace Treaty, officially bringing an end to the U.S. war with Japan.⁷ At the same time, the U.S.-Japan Mutual Defense Treaty was signed⁸. Key points of the treaty were the reclamation of sovereignty by the government of Japan, the continued presence of U.S. forces to defend Japan while it maintained its new pacifist military

⁵ Office of the Historian, "Occupation and Reconstruction of Japan, 1945-52", *U.S. Department of State*, No Date.

⁶ Japan: Places, Times, and Transformations, "The Yoshida Doctrine", *University of Pittsburg*, n.d.

⁷ "Treaty 1 of Peace Signed with Japan," United Nations Treaty Series, Sep. 8, 1951.

⁸ Japan Ministry of Foreign Affairs. *Treaty of Mutual Cooperation and Security Between Japan and the United States of America*, Jan. 19, 1960.

doctrine and providing a framework for the two states to address security issues in East Asia.⁹ At its core, the purpose of the treaty was to establish peaceful relations between the U.S. and Japan.

In the years following the signing of the San Francisco treaty however, positive relations between the U.S. and Japan remained elusive. Despite the provisions of the treaty, anti-U.S. sentiment remained high, eventually leading to several rounds of mass protests against the presence of U.S. military forces.¹⁰ Additionally, Japanese citizens were upset with certain provisions of the alliance that allowed the U.S. to insert itself in Japanese politics to resolve domestic disputes when it saw fit to prevent the resurgence of imperialism, which the Japanese perceived as a significant violation of their sovereignty.¹¹ The protests eventually grew to such a size that they forced Japanese Prime Minister Nobusuke Kishi (grandfather of recent P.M. Shinzo Abe) out of office, forcing incoming U.S. president John F. Kennedy to reevaluate the agreement.¹²

In 1961, Kennedy and new Japanese Prime Minister Hayato Ikeda collaborated to revise the treaty to include new provisions to help repair the fractured relationship. One of the most important of these provisions was Article 5 of the agreement, which states:

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.¹³

⁹ L. Maizland, “The U.S.-Japan Security Alliance”, *The Council on Foreign Relations*, Aug. 22, 2019.

¹⁰ C. Jones, “After the Uprising”, *The Nation*, March 3, 2020.

¹¹ N. Kapur, *Japan at the Crossroads: Conflict and Compromise* (Harvard University Press, 2018)

¹² “Japanese protest security treaty with U.S. and unseat Prime Minister, 1959-1960”, *Global Nonviolence Action Database*, n.d..

¹³ Japan Ministry of Foreign Affairs. *US-Japan Mutual Defense Treaty*, Jan. 19, 1960. <https://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>

Article 5 states that in the event that Japan were to come under attack by a foreign power, the U.S. is legally obligated to come to its assistance. This helped offset a large amount of the hostility targeted at the U.S. for maintaining a military presence in Japan while simultaneously leaving Japan's security up to the U.S. given Japan's pacifist constitution. To address concerns about Japanese sovereignty, the revisions were presented to the Japanese public under a framework of "equal partnership," in which the U.S. would consult with Japan when making decisions about security matters in the region, and that Japan would be notified prior to any mobilization of U.S. forces.¹⁴

Another key development in the U.S.-Japan alliance came in the 1960s with Prime Minister Eisaku Satō's Three Non-Nuclear Principles. Presented as a resolution to the Japanese parliament in December 1967, the three principles reflect Sato's objectives of "not possessing, not producing and not permitting the introduction of nuclear weapons" into Japan.¹⁵ In large part a reaction to being the recipient of the U.S. atomic bomb during World War II, the three principles have largely guided Japan's foreign policy regarding nuclear weapons for the past half century, and have served as an anchor of Japan's military doctrine of self-defense and pacifism. While Japan's doctrine has largely served to form the basis of a cooperative military relationship with the U.S., concerns have emerged about the long-term viability of this doctrine and will be discussed later in this paper.

Since its low point in the late 1950s/early 1960s, the U.S.-Japan alliance has grown to be one of the strongest and longest lasting U.S. partnerships and has served as a platform for cooperation on a variety of issues including security, trade, terrorism, technology, and climate

¹⁴ Kapur, *Japan at the Crossroads: Conflict and Compromise*, p. 36

¹⁵ Japan Ministry of Foreign Affairs. *Three Non-Nuclear Principles*, Dec. 11, 1967. <https://www.mofa.go.jp/policy/un/disarmament/nnp/>

change.¹⁶ In Article 4 of the Mutual Defense Treaty (MDT), it was stated that the original term of the treaty was to extend for a minimum of 10 years, and after that being subject to the consultation of both partners if termination was desired.¹⁷ For over seven decades, the treaty continues to remain in full effect, reflecting the willingness of the U.S. and Japan to continue cooperation under the framework of the alliance.

The rise of China however has presented a new set of challenges to the two allies. With China being the number one trading partner for both the U.S. and Japan, significant effort was made to integrate China into the international liberal order to establish economic relationships and open access to new markets.¹⁸ While the People's Republic of China (PRC) certainly appreciated its welcoming into the economic fold, its military developments have caused concern amongst the very states that granted it access to the institutions that fueled its development. One of these areas of concern has been China's expansionist policy in the Pacific islands which this next chapter will address, beginning with the Japanese islands of Okinotori.

¹⁶ J. Walker, "Japan's Global Re-Emergence: How Japan's Active Diplomacy Strengthens the Foundations of the U.S.-Japan Alliance", *The Huffington Post*, June 10, 2015. https://www.huffpost.com/entry/japans-global-reemergence_b_7013506

¹⁷ Japan Ministry of Foreign Affairs, *US-Japan Mutual Defense Treaty*

¹⁸ D. Workman, "Japan's Top Trading Partners", *World's Top Exports*, 2021. <https://www.worldstopexports.com/japans-top-import-partners/>

CHAPTER 2: OKINOTORI AND THE LAW OF THE SEA

The islands of Okinotori are located 1,097 miles from mainland Japan in between Guam and Taiwan and are considered by the Japanese government as its “southernmost territory.”¹⁹ By claiming it as territory, Japan asserts that it has the right to an exclusive economic zone (EEZ) in which for two hundred miles Japan would have the sovereign right to all of the natural resources surrounding Okinotori. In an almost mirror image of the disputes over Chinese artificial reefs, Tokyo has claimed the waters surrounding the Okinotori as an exclusive economic zone (EEZ) and has slammed China for conducting Freedom of Navigation Operations (FONOPS) without Japanese permission.²⁰

The history of Okinotori goes back to the 16th century when it was originally discovered by Spanish explorers.²¹ In 1931, it was claimed by Japan after being discovered by Imperial Naval vessels, and was named Okinotorishima, which translates to “remote bird islands.”²² Initially, the small island chain consisted of five major rock formations, totaling a mere 9 square meters. As a result of erosion, only three of the five rocks remain today. The Japanese government has made efforts to construct artificial sand and reef areas to preserve the island’s land mass, and has also built research facilities on the island to maintain a Japanese presence.²³

¹⁹ R. Jennings, “Japan Is Quietly Building A Tiny Tropical Islet, But An Angry China Has Noticed”, *Forbes*, July 17, 2016. <https://www.forbes.com/sites/ralphjennings/2016/07/17/japan-is-quietly-building-a-tiny-tropical-islet-but-an-angry-china-has-noticed/?sh=4903cde8705b>

²⁰ T. Siripala “Japan Slams China for Unauthorized Research Around Okinotori Island”, *The Diplomat*, Jan. 8, 2019. <https://thediplomat.com/2019/01/japan-slams-china-for-unauthorized-research-around-okinotori-island/>

²¹ “Okinotori: An Odd Place for a Maritime Dispute”, *Stratfor*, May 11, 2016 <https://web.archive.org/web/20100917225428/http://jorgesanchez.es/15ViajerosCeltiberos/15ViajerosCeltiberos.htm>

²² P. Bowring “Okinotorishima: Just the Tip of the Iceberg.” *Radio Free Asia*, Sept. 13, 2012. <https://www.rfa.org/english/commentaries/perspective/island-09132012191529.html>

²³ I. Minetoshi, “Japan to renovate remote observation post to retain claim over EEZ”, *Internet Archives*, Feb. 1, 2016.

https://web.archive.org/web/20160202102901/http://ajw.asahi.com/article/behind_news/politics/AJ201602010049

While some underwater rock formations of the original island remain, the above water surfaces are almost entirely artificial, and due to their lack of ability to sustain a human presence, would not be allowed under the Law of the Sea Treaty (UNCLOS) to maintain an EEZ according to the Hague ruling in 2016.²⁴

Technically Okinotori is considered an “atoll”, which is defined by UNCLOS as a “reef with or without an island situated on it surrounded by the open sea that encloses or nearly encloses a lagoon.”²⁵ In November 2008, Japan officially submitted the legal request to the United Nations at the Commission on the Limits of the Continental Shelf to officially recognize Okinotori as part of Japanese territory and to grant it an exclusive EEZ.²⁶ Both China and South Korea opposed Japan’s submission on the grounds that it violated UNCLOS Article 121, that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”²⁷ In 2012, the Commission decided that Japan lacked the standing for claim to Okinotori and declined to review the submission for sovereignty.²⁸ Despite the ruling, Japan has continued to administer control of the islands and has used patrol boats to consistently ward off ships that attempt transit through the island waters, including a Chinese research vessel in 2015 and detaining a Taiwanese fishing boat in 2016.²⁹

²⁴ A. Macias, “The Hague just threw out Beijing's '9-dash line' in the South China Sea ruling”, *Business Insider*, July 12, 2016. <https://www.businessinsider.com/no-nine-dash-line-in-the-south-china-sea-2016-7>

²⁵ United Nations. *Convention on the Law of the Sea*. Dec. 10, 1982. p. 23
https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

²⁶ United Nations. Division for Ocean Affairs and the Law of the Sea. *Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines*: Submission by Japan. Nov. 12, 2008. https://www.un.org/depts/los/clcs_new/submissions_files/submission_jpn.htm

²⁷ United Nations. *Convention on the Law of the Sea*. p. 63.

²⁸ “China welcomes UN decision on Okinotorishima”, *Global Times*, May 17, 2012.
<https://www.globaltimes.cn/content/709913.shtml>

²⁹ S. Tiezzi “Taiwan-Japan Fishing Dispute Heats Up”, *The Diplomat*, May 3, 2016.
<https://thediplomat.com/2016/05/taiwan-japan-fishing-dispute-heats-up/>

Under international law, since Okinotori has not been recognized as Japanese islands, these patrol operations are technically illegal. That begs the question of why Japan continues to pursue such claims and why the U.S. remains reticent on the issue.

The reason has to do with the strategic location of Okinotori. Located 1,097 miles from mainland Japan, Okinotori lies in between Guam and Taiwan. Given the growing strategic importance of Taiwan to both the U.S. and China, maintaining an exclusive EEZ in the waters East of Taiwan would be highly valuable to the U.S. and Japan. Controlling those waters would better enable warfighting operations in the event of a Chinese invasion of Taiwan, as it would be in this location that China would attempt to use its own naval forces to intercept U.S. carriers and warships that would be deployed in Taiwan's defense.³⁰ From the Chinese perspective, U.S. and Japanese control of Okinotori is perceived as another attempt to encircle China and turn Taiwan into an armed military fortress to either contain China, or to use as a prelude to an invasion or strikes on the mainland.

Several statements and actions from U.S. policy officials across presidential administrations have signaled disapproval towards Chinese construction of artificial reefs. In June 2015, President Obama said in an NPR interview with Secretary of Defense Ash Carter and Japanese Naval leadership that regarding Chinese "excessive maritime claims", that "they shouldn't just try to establish that based on throwing elbows and pushing people out of the way".³¹ The Trump Administration went even farther in the summer of 2020, blacklisting 24 Chinese companies and individuals involved in the island construction from doing business with

³⁰ S. Tisdall "Pacific power play puts Japan and China between a rock and a hard place", *The Guardian*, April 4, 2005. <https://www.theguardian.com/world/2005/apr/05/japan.china>

³¹ "U.S. Criticizes China For Construction In South China Sea", *National Public Radio*, June 1, 2015. <https://www.npr.org/2015/06/01/411271126/u-s-criticizes-china-for-construction-in-south-china-sea>

U.S. firms.³² In spring of 2021, The Biden administration’s State Department issued its first joint statement with the Japanese government which included labeling Chinese actions as “inconsistent with the existing international order”.³³

While the Okinotori project may not be as large as the Chinese artificial island construction in the South China Sea which began much later, it may serve as an analogous precedent if Japan maintains its claims. This has created a conundrum where the U.S. on the one hand condemns China’s construction of artificial islands in the South China Sea, while on the other hand is simultaneously defending Japan’s maintenance of an EEZ on its own artificial claims. This could create trouble for U.S. Freedom of Navigation Operations (FONOPs) if they are seen as selectively enforcing international legal standards favorable to the U.S. The danger is that adversaries may be more prone to engage FONOPs if they perceive them as legitimate military targets with hostile intent as opposed to enforcers of international maritime law.

If the international norms governing maritime activities in Asia lose legitimacy, there could be several consequences for U.S. national interests, including economic, political, and military.

For the past century, freedom of navigation and the security of shipping lanes of commerce (SLOCs) has been the bedrock of international trade that has allowed living standards across the planet to rise and maintained U.S. preeminence as the global economic superpower. According to The United Nations Conference on Trade and Development (UNCTAD), 80% of international trade passes through Asia at some point in transit, therefor making the stability of

³² S. Heavey “U.S. targets Chinese individuals, companies amid South China Sea dispute”, *Reuters*, Aug. 26, 2020. <https://www.reuters.com/article/us-usa-china-southchinesea-companies/u-s-targets-chinese-individuals-companies-amid-south-china-sea-dispute-idUSKBN25M1O6>

³³ U.S. Department of State, “U.S.-Japan Joint Press Statement”, News release, March 16, 2021 <https://www.state.gov/u-s-japan-joint-press-statement/>

Asian shipping lanes a necessity for continual functioning of the global economy.³⁴ Escalating disputes over maritime law not only could lead to slowdowns as a result of frictions in trade tensions, but also overtime weaken investor certainty if markets are perceived to be constantly under threat from legal and political battles.

Regarding military consequences, international law lies at the heart of several disputes that pose dangerous escalation risks. The precedent that only states with a powerful navy can ignore international law may have ripple effects for naval disputes in other regions. Iran may feel more tempted to disrupt freedom of navigation in the Strait of Hormuz, another important chokepoint for international trade. In the Arctic, stability has prevailed, despite competing political claims, in large part due to adherence to UNCLOS. The absence of a strong institutional foundation grounded in international law may lead to accelerated military deployment of destabilizing military forces, which is especially dangerous given that the U.S. and Russia, the two largest Arctic nations, both have nuclear weapons.

Politically, the value of credible international law to U.S. interests is more nuanced. The U.S. has not ratified UNCLOS primarily out of concern that strict adherence to international maritime law would undermine U.S. sovereignty. However, the U.S. still follows UNCLOS, and uses it as a model to maintain stability on the high seas. In particular, Russia has signaled an interest in stabilizing UNCLOS rules which their fractured economy is dependent on and has used UNCLOS as a medium to cooperate with the U.S., including establishing the navigational regimes inside UNCLOS.³⁵ Despite Russia's portrayal of a foreign policy that opposes the U.S. in every instance, maritime legal cooperation has, and can continue to be a point of shared

³⁴ "How Much Trade Transits the South China Sea?" Center for Strategic and International Studies, 2016. <https://chinapower.csis.org/much-trade-transits-south-china-sea/>

³⁵ J. Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, (Oxford University Press, 2011), pp. 149-150

interests between the two that can serve to stabilize incidents that have escalatory potential. U.S./Russia maritime cooperation will be increasingly important regarding disputes over Russian claims in the Arctic and credible international law may incentivize nations to resolve disputes in this area.

The Hague Tribunal court ruling also has implications for Japanese claims on the Senkaku. Located in the East China Sea, northeast of Taiwan, east of China, and west of Okinawa, the Senkaku are an uninhabited chain of islands that have been subject to disputes between China and Japan since the late 1960s. Following World War II, the U.S. took over administration of the islands, during which vast amounts of offshore oil reserves were discovered in the surrounding waters.³⁶ In 1972, the U.S. officially transferred administrative control of the islands back to Japan, amidst strong protest from China. The PRC claims that the islands were originally Chinese territory that was established in the 16th century, and then lost to Japan as part of the first Sino-Japanese War.³⁷ From 1972-1978, China continuously sailed naval vessels through the waters surrounding the Senkaku, as well as conducted illegal fishing operations in the area to demonstrate its views on the new Japanese ownership.³⁸ This resulted in tense relations between the two states until the Treaty of Peace and Friendship was signed in 1978 for the purpose of further developing “Sino-Japanese good-neighborly and friendly relations”.³⁹ Japan then sold the Senkaku to private owners, and the dispute was largely forgotten for the next 3 decades.

³⁶ S. Lee, *Territorial Disputes Among Japan, China and Taiwan Concerning the Senkaku Islands*, (IBRU, 2002) p. 22.

³⁷ Ministry of Foreign Affairs for the PRC. *Full Text: Diaoyu Dao, an Inherent Territory of China*. Sept. 26, 2012. https://www.fmprc.gov.cn/mfa_eng/topics_665678/diaodao_665718/t973774.shtml

³⁸ T. Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions", *Asia Policy*, vol. 15, No. 3, (2020) p. 24.

³⁹ Ministry of Foreign Affairs for the PRC. *Sino-Japanese Treaty of Peace and Friendship*. 1978 https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18012.shtml

In 2012, the Senkaku once again became a flashpoint between Japan and China, when Japan re-purchased the islands from its private owners.⁴⁰ China once again began sailing its naval vessels through the Senkaku, which since 2012 have become a recurring activity, around 3-4 times per month.⁴¹ In addition to the economic resources present in the Senkaku, China's territorial incursions have also been perceived as part of its broader strategy of normalizing its military presence throughout the Indo-Pacific.⁴² This explains why despite being only 7 square KM and possessing no population, China strongly seeks to assert itself in the Senkaku and why Japan, who sees China as its top national security threat, wants them out.⁴³

The Hague Tribunal reaffirmed UNCLOS Article 121, that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."⁴⁴ Given that the Senkaku have been uninhabited for decades, the importance of the Hague ruling in determining an EEZ lies in whether the Senkaku are considered islands or rocks.

The UNCLOS text on the exact definition of an island does not do much to clarify the legal debate on the Senkaku. According to Article 121, an island is a "naturally formed area of land, surrounded by water, which is above water at high tide"⁴⁵. The charter does not give specific size or technical requirements for when a rock becomes an island, leading to ambiguity in the case of the Senkaku. When taking the "naturally formed area" segment, there appears to be

⁴⁰ Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions" p. 21.

⁴¹ "Tensions in the East China Sea", Council on Foreign Relations, n.d. <https://www.cfr.org/global-conflict-tracker/conflict/tensions-east-china-sea>

⁴² A. PATALANO, "What is China's Strategy in the Senkaku Islands?", *War on the Rocks*, Sept. 10, 2020. <https://warontherocks.com/2020/09/what-is-chinas-strategy-in-the-senkaku-islands/>

⁴³ F. Gady, "Surprise: Japan Sees China as Its Main National Security Threat", *The Diplomat*, July 21, 2015. <https://thediplomat.com/2015/07/surprise-japan-sees-china-as-its-main-national-security-threat/>

⁴⁴ United Nations. *Convention on the Law of the Sea*, p. 63.

⁴⁵ United Nations. *Convention on the Law of the Sea*, p. 63.

a clear contrast between the Senkaku and Okinotori, which has undergone numerous rounds of artificial construction to maintain the land mass.

That still however leaves the question of habitability. With section 3 stating that human settlement is a necessary condition for an exclusive EEZ, it would appear the Senkaku do not meet the UNCLOS requirements. That standard on its own however also creates several definitional problems. Devon Island, part of the Canadian Arctic Archipelago, has a land mass of 55,247 square km, undoubtedly leading to its classification as an island as opposed to a rock, yet it remains uninhabited due the extreme cold⁴⁶. It is this vagueness of the UNCLOS charter that is at the heart of the diplomatic disputes in the East and South China Seas.

In November of 2020, congress established the Pacific Deterrence Initiative (PDI) as part of the FY2021 National Defense Authorization Act (NDAA) to appropriate funds for improving the U.S. military's posture and readiness in the Indo-Pacific.⁴⁷ The narrative surrounding the PDI and the subsequent U.S. pivot towards East Asia suggests that China is engaging in revisionist behavior that seeks to rewrite the rules of the road for international trade and maritime security, ultimately making the world less favorable to the U.S. and its allies. To prevent this from occurring, the U.S. must rally its allies, in East Asia and the rest of the world, to ensure stability, the continuation of the present economic order, and freedom of navigation. This narrative has many strategic benefits. It provides a clear strategic objective of containing Chinese adventurism in order to preserve economic and geopolitical stability. It also serves as a rallying cry for ensuring U.S. allies of the necessity of working together to prevent China from exploiting differing national objectives. However, it is important to remember that it is just a narrative. The

⁴⁶ K. Patowary, "Devon Island: Mars on Earth", *Amusing Planet*, May 14, 2016.
<https://www.amusingplanet.com/2016/05/devon-island-mars-on-earth.html>

⁴⁷ B. Clark, "Fix the Pacific Deterrence Fund—and the Deeper Problem It Reveals", *Defense One*, June 23, 2021.
<https://www.defenseone.com/ideas/2021/06/fix-pacific-deterrence-fundand-deeper-problem-it-reveals/174898/>

mindset of “we” are always right and “they” are always wrong led to several policy disasters in the Cold War when competing with Russia. Despite China’s revisionist actions, there are many economic and social incentives to form compromises when needed while still competing in other areas.

Recognition of inconsistencies in U.S. interpretations of international law does not excuse misinterpretations by other states, nor should it justify both states actions as in the case with China. By avoiding being hypocritical when condemning China, the U.S may serve to bolster the international narrative against China by making concessions on its own regarding compliance with international law. Narratives are powerful forces, and the U.S. narrative of rule of law and democracy has historically been a key factor in other states considering it the defender of the free world. Of course, there is the risk that China may take advantage of concessions on international law while continuing to violate it where it sees fit. The act of balancing a revisionist China while maintaining the prospects for a dialogue or compromise on East Asian island building will be discussed in the next section.

CHAPTER 3: BENEFITS OF MARITIME CONCESSIONS

Some legal and defense scholars have argued that working with Japan to bring them into compliance with international law regarding the Senkaku and Okinotori will reverse U.S. hypocrisy towards international law and result in greater international pressure against China to follow suit.⁴⁸ William Overholt, senior research fellow at Harvard’s Kennedy School, argues that current U.S. policy towards the Pacific islands lacks “nuance”, and “complexity and balance in favor of a Manichean narrative of good and evil”.⁴⁹ By resolving compliance issues regarding Okinotori, the U.S. and Japan can in good faith come to the negotiating table with China, and perhaps achieve a broader agreement over the future of the Pacific islands.

Ankit Panda, senior fellow in the Nuclear Policy Program at the Carnegie Endowment, says that such good faith from the U.S. and Japan would incentivize China to follow suit regarding its own claims on Pacific Islands.⁵⁰ Likewise, if Japan were to renege on its claims to Okinotori, China would be faced with a lack of legal standing regarding its claims in the South China Sea. He cites the repeated remarks by Hua Chunying, director of the Foreign Ministry Information Department of China, in stating:

Okinotori is an isolated rock in the West Pacific far away from the homeland of Japan. As prescribed in the UNCLOS, rocks like Okinotori which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone nor continental shelf. In April, 2012, the Commission on the Limits of the Continental Shelf gave its recommendations in regard to the submission made by Japan on the limits of its outer continental shelf, not recognizing Japan's claim of an outer continental shelf based on Okinotori. Japan has violated the UNCLOS by

⁴⁸ W. Overholt, “In countering China, the US must not lose its knack for nuanced diplomacy”, *South China Morning Post*, Aug. 6, 2020. <https://www.scmp.com/comment/opinion/article/3096155/countering-china-us-must-not-lose-its-knack-nuanced-diplomacy>

⁴⁹ Overholt, “In countering China, the US must not lose its knack for nuanced diplomacy”.

⁵⁰ A. Panda, “China’s Okinotori Position Reveals an UNCLOS Double Standard”, *The Diplomat*, May 3, 2016 <https://thediplomat.com/2016/05/chinas-okinotori-position-reveals-an-unclos-double-standard/>

categorizing Okinotori as "island" for the purpose of claiming for EEZ and continental shelf based on that. China does not recognize the illegal assertion by Japan.⁵¹

How the U.S. changes its position on Okinotori could take on a variety of forms. The State Department could make public statements that it does not consider Japanese claims to Okinotori legitimate as a symbolic gesture to China, yet not take any tangible policy action to avoid souring relations with Japan. Without meaningful concessions however, reciprocal action by China to enter into compliance with UNCLOS is unlikely to occur.

Another option would be to legally codify that the U.S. does not perceive Okinotori as territory of Japan as per the U.S.-Japan MDT and issue public statements that the U.S. does not believe that Article 5 would apply to Okinotori. While this may have a greater chance of bringing China to the negotiating table, it is also likely to alienate Japan who may perceive that the U.S.' primary objective in Asia is reconciliation with China at the expense of Japanese interests.

A third option would be diplomatic outreach to Japan. The U.S. could consult Japan over the conditions in which it would no longer feel the need to maintain administrative control over Okinotori. This scenario would most likely involve some form of guaranteed security assurance to Japan, as Japan would likely strongly oppose giving up what it believes to be sovereign territory.

Another approach would be for the U.S. and Japan to modify the MDT and work to amend Japan's constitution to allow Japan to take on a greater military role in the Indo-Pacific, at which point it could take matters regarding Okinotori into its own hands, allowing the U.S. to

⁵¹ Ministry of Foreign Affairs for the PRC. *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference*, News release, April 29, 2016
https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1360007.shtml

distance itself from the dispute at which point it can continue to apply pressure on China regarding the South China Sea. This course of action will be discussed in the Chapter 8. The next chapter will discuss the negative consequences of the U.S. and Japan making concessions regarding the Okinotori islands.

CHAPTER 4: COSTS OF MARITIME CONCESSIONS

From a top-level analysis, there is the case that despite the best efforts of the U.S., other nations do not model U.S. behavior. History is rife with examples of legal norms promising to fundamentally transform global society and to rid the world of conflict. For example, the 1928 Kellogg-Briand Pact was signed in the aftermath of World War 1 to outlaw all future wars.⁵² The League of Nations was meant to serve a similar purpose, but both institutions did little to stop the march of militarism leading up to World War II. The United Nations, the current arbiter of international legal disputes, is arguably more successful than its predecessors. In countries including Korea, Haiti, Liberia, East Timor, and the Balkans, it has served an important role in managing post-conflict transitions, supervising elections, providing humanitarian programs and assistance, and peacekeeping.⁵³ The UN however has also shown its limits, such as addressing conflict in Syria and bureaucratic gridlock stalling action to respond to humanitarian crises.

During the Cold War there was a constant debate between deterrence theorists over rather or not it was beneficial to have limitations on weapon systems and deployment. The argument in favor of limitations was that they were necessary to halt the spiral between the U.S. and Russia of the deployment of new weapons and establish strategic stability.⁵⁴ Those that opposed limitations claimed that Russia was more than willing to take advantage of concessions when it suited them and exploit U.S. adherence to treaties to establish a strategic advantage.⁵⁵

⁵² U.S. Office of the Historian. *The Kellogg-Briand Pact*, n.d. <https://history.state.gov/milestones/1921-1936/kellogg>

⁵³ C. Hagel, "Why Chuck Hagel Supports the United Nations", *UN Dispatch*, Jan. 7, 2013. <https://www.undispatch.com/why-chuck-hagel-supports-the-united-nations/>

⁵⁴ R. Jervis, "Was the Cold War a Security Dilemma", *Journal of Cold War Studies*, vol. 3, no. 1 (2001) pp. 36–60

⁵⁵ G. Kennan, "The Long Telegram", *The Wilson Center*, 1946. <https://digitalarchive.wilsoncenter.org/document/116178.pdf>

The concern today is that China may exploit any concessions that the U.S. makes in the South or East China Sea and continue to violate international norms. Current suspicions that China has been conducting low yield nuclear testing despite it signing the Comprehensive Test Ban Treaty (CTBT) should raise concerns.⁵⁶ While the issue of Chinese low yield testing entails a complicated debate over what constitutes a “zero yield” test (which is the language of the CTBT) what it demonstrates is that China can and will circumvent international agreements when it is in its interest to do so.⁵⁷

For international norms such as UNCLOS to be effective, multilateral rather than unilateral support often has been the most effective method. For example, when establishing a sanctions regime, having multiple countries involved in applying the sanctions tends to be more effective. The reason for this is because with more states involved in applying the sanctions, there are states outside of the sanctions regime that could help the target state circumvent economic setbacks.⁵⁸ When it comes to military action, the U.S. has also sought to achieve the support of other countries as opposed to unilateral action, as in the case with the second Iraq war and the Coalition of the Willing, and the U.S.-led coalition against ISIL in Iraq and Syria.⁵⁹

Mancur Olson’s theory of collective action can be used to shed light on the difficulty of the U.S. as a norm leader encouraging China to likewise follow international norms.⁶⁰ According to Olson, enforcement of international norms or protocols requires more than one lead actor in

⁵⁶ R. Hersman. “Decoding the Latest U.S. Report on Arms Control: Are Russia and China Really Cheating?”, *Center for Strategic and International Studies*, April 17th, 2020 <https://www.csis.org/analysis/decoding-latest-us-report-arms-control-are-russia-and-china-really-cheating>

⁵⁷ United Nations Office for Disarmament Affairs. *The Comprehensive Nuclear-Test-Ban Treaty (CTBT)*. Sept. 1996. https://www.ctbto.org/fileadmin/user_upload/legal/CTBT_English_withCover.pdf

⁵⁸ D. Peksen, “When Do Economic Sanctions Work Best?”, *Center for New American Security*, June 10, 2019. <https://www.cnas.org/publications/commentary/when-do-economic-sanctions-work-best>

⁵⁹ J. Knopf, “Challenges to enforcing nonproliferation and disarmament norms”, *Contemporary Security Policy*, vol. 39, no. 3 (2018) pp. 367-398

⁶⁰ M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard Economic Studies, 1965) pp. 46.

order to be effective. Otherwise, what is known as the free-rider problem may occur, which is when “someone receives a benefit without contributing towards the cost of its production”.⁶¹ In the case of China, the free-rider problem can be seen with the Chinese taking full advantage of the U.S.-led international order when it comes to international trade and entry into multilateral political organizations, but then free-riding by not enforcing UNCLOS norms because they go against China’s interests in the South China Sea.

China’s strategy of building so-called legitimate legal arguments for their claims in the South China Sea further adds to the difficulty of the free-rider problem and rallying multilateral support against their efforts. Rather than just outright admit they are in violation of international law; China has presented their own arguments to The Hague as to why their claims are justified. Similar to a criminal defense attorney, China’s objective is not to demonstrate that their claims are necessarily the right ones, but to cast doubt in the minds of other states that China is in fact violating UNCLOS. If other members of the international community are not convinced beyond a reasonable doubt that China is violating UNCLOS, they are less likely to work with the U.S. in applying punitive measures.

The argument China has put forth since the initial construction of artificial reefs has been that the South China Sea territory is historically part of China and that they are merely reclaiming national borders that once belonged to them.⁶² These historical assertions on their own have encountered heavy scrutiny from the international community, as researchers have found several flaws with China’s interpretation of historical documents from which such claims

⁶¹ “The Free Rider Problem”, *Stanford Encyclopedia of Philosophy*, May 21, 2003. <https://plato.stanford.edu/entries/free-rider/>

⁶² The State Council Information Office of the P.R.C. *White Paper: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*. July 13, 2016. http://www.china.org.cn/chinese/2016-07/13/content_38870185.htm

derive. On such flaw is that the geographical area discussed in ancient Chinese texts is drastically different than the area in the South China Sea China is currently claiming.⁶³ The texts also do not make any reference to China have sovereignty over the South China Sea, but rather that they are important to the Chinese empire.⁶⁴ Additionally, these claims were what The Hague tribunal ruled against in 2016, rendering their status in international law moot.⁶⁵ However, these historical claims, while perhaps the most discussed in media and political circles, do not constitute the core argument of China's legal claims presented to the UN.⁶⁶

China's legal arguments in claiming the South China Sea are made up of three key components.⁶⁷ The first is that China claims that it is an archipelagic state, and thus has right not only to the islands but all the waters within its territory.⁶⁸ The second is that China claims a 12 nautical mile zone from the territories out into the ocean as its exclusive territory. The third is that China then claims a 200-mile exclusive economic zone (EEZ) from that initial 12-mile extension and claims it has the legal authority to limit freedom of passage of military and civilian ships due to it being China's EEZ.

There are significant problems with the first two components of China's argument. First, China is a continental state, and has not been accorded archipelagic status according to the United Nations Convention on the Law of the Sea (UNCLOS) section on the Practice of

⁶³ J. Jacobs, "China's frail historical claims to the South China and East China Seas", *American Enterprise Institute*, June 26, 2014. <https://www.aei.org/research-products/report/chinas-frail-historical-claims-to-the-south-china-and-east-china-seas/>

⁶⁴ J. Jacobs, "China's frail historical claims to the South China and East China Seas"

⁶⁵ T. Philips, "Beijing rejects tribunal's ruling in South China Sea case", *The Guardian*, July 12, 2016. <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>

⁶⁶ O. Mastro, "How China is bending the rules in the South China Sea", *The Lowly Interpreter*, Feb. 17, 2021. <https://www.lowyinstitute.org/the-interpretor/how-china-bending-rules-south-china-sea>

⁶⁷ Mastro, "How China is bending the rules in the South China Sea".

⁶⁸ X. Yanmei, "China Hardens Position on South China Sea", *The Diplomat*, July 16, 2016. <https://thediplomat.com/2016/07/china-hardens-position-on-south-china-sea/>

Archipelagic States.⁶⁹ Second, even for nations with archipelagic status, declaring a baseline EEZ is limited to land masses of the original, legally defined archipelago. Artificial islands, such as the ones China is constructing, are not considered to have met this criteria, as UNCLOS “excludes the possibility of employing straight baselines in other circumstances, in particular with respect to offshore archipelagos not meeting the criteria for archipelagic baselines”.⁷⁰

The third argument regarding limiting the passage of foreign vessels in territorial waters is where matters become more complicated. While the right to freedom of navigation is supported by UNCLOS, several nations have come to China’s side in its interpretation of international law.⁷¹ Argentina, Brazil, India, Indonesia, Iran, Malaysia, the Maldives, Oman and Vietnam have all agreed with China that military vessels are not entitled to freedom of navigation in territorial waters, insisting that this infringes on the coastal state’s national security.⁷² By exploiting other countries fear of threats to their own national security, China has used this issue to drive a wedge in forming an international coalition against its activities in the South China Sea, as states are now caught up in disputing the interpretation of UNCLOS as opposed to solidifying an alliance against Chinese territorial expansion. China has functionally baited these states into becoming free riders as a result of its own violations of international law.

One of the primary reasons for Japan’s stake in Okinotori is its importance to U.S. and Japanese defense policy. As noted in chapter 2, the waters west of Okinotori which would be considered part of Japan’s EEZ extend to East Taiwan. In the event of a military contingency between China and Taiwan, these waters would be of strategic value to China who would likely

⁶⁹ United Nations. Office for Oceanic Affairs and the Law of the Sea. *The Law of the Sea: Practice of Archipelagic States*. (1992) p. 20.

<https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/publications/E.92.V.3.pdf>

⁷⁰ The Republic of Philippines v. The People's Republic of China, 2013-19 (Permanent Court of Arbitration, 2013)

⁷¹ E. Freund, “Freedom of Navigation in the South China Sea: A Practical Guide”, *Harvard Belfer Center*, June 2017. <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>

⁷² Mastro, “How China is bending the rules in the South China Sea”.

use them to deploy submarine assets to prevent U.S. carrier forces from entering the region.⁷³ By making concessions on Okinotori, the U.S. and Japan would not only be making a symbolic concession normalizing Chinese presence throughout the Indo-Pacific, but they would also be relinquishing a strategic waterway that may be of crucial importance in the event that warfighting were ever to breakout between the U.S. and China.

Capability asymmetries between the U.S., China, and the rest of states involved in the South China Sea further exacerbate this problem. Given the relative power of the U.S. and its historical tradition of enforcing international law, norm compliance becomes more difficult in disputed situations because smaller states see it as a problem for the larger states to resolve. After the seizing of the Scarborough Shoal, military demonstrations in the South China Sea such as the sailing of naval vessels through contested waters has been largely left up to the two superpowers, while neighboring states sit on the sidelines. This sends the signal that if the U.S. wishes to enforce maritime law, it has the capability to do so on its own. Other regional states are then reluctant to support the U.S. in promoting international maritime law because they believe it is a problem between the U.S. and China and does not pertain to their interests.

Another major argument against the U.S. and Japan making concessions in international law disputes is that the magnitude of China's disregard of international law in the South China Sea is far greater in terms of scale than the inconsistencies of the U.S. The adherence to UNCLOS by the U.S. and its allies might not be perfect, as demonstrated by the Okinotori dispute. However, some of China's claims however have been particularly outrageous.

⁷³ S. Tisdall "Pacific power play puts Japan and China between a rock and a hard place", *The Guardian*, April 4, 2005. <https://www.theguardian.com/world/2005/apr/05/japan.china>

One such case of China's claims is its seizure of the Scarborough Shoal in 2012, which at 150 square kilometers, is fifteen times the size of Okinotori.⁷⁴ In 2012, China took control of the resource-rich reef from the Philippines by using its coast guard to blockade Filipino ships from entering nearby waters.⁷⁵ While most disputes in the East and South China Seas center around uninhabited rocks, the Scarborough Shoal incident was unique in that the fishing waters surrounding it constituted a major food source for the Philippines, and restricting access caused severe setbacks to the country's agricultural supply.⁷⁶ Given the magnitude of the seizure of the Shoal, along with the consequences that came with it, it will be difficult for the U.S. to establish an effective UNCLOS model by resolving its inconsistencies when China has had such flagrant violations in the past.

This same logic applies when discussing China's UNCLOS violations regarding the South China Sea. For the past several years, coverage of the South China Sea can be described as a volley between the U.S. and China demonstrating a visible presence by sending naval vessels or air patrols through contested areas as a constant reminder to the other that their claim is being challenged. Given the growing parity of the U.S. and Chinese navies, the result is now a "game of chicken" reserved only for great powers.⁷⁷ Other regional powers, whose navies are much smaller, are excluded from participating, amounting to a might-makes-right framework for UNCLOS. Even if the U.S. were to pressure Japan into making concessions on Okinotori, China

⁷⁴ "Scarborough Shoal", *CSIS Asia Maritime Transparency Initiative*, n.d. <https://amti.csis.org/scarborough-shoal/>

⁷⁵ "Philippine warship in standoff with China vessels", *The Guardian*, April 10, 2012.

<https://www.theguardian.com/world/2012/apr/11/philippines-china-stand-off-south-china-sea>

⁷⁶ A. Higgins, "In Philippines, banana growers feel effect of South China Sea dispute", *The Washington Post*, June 10, 2012. https://www.washingtonpost.com/world/asia_pacific/in-philippines-banana-growers-feel-effect-of-south-china-sea-dispute/2012/06/10/gJQA47WVTV_story.html

⁷⁷ J. Perlez, "U.S. and China Are Playing 'Game of Chicken' in South China Sea", *New York Times*, Nov. 8, 2018.

https://www.nytimes.com/2018/11/08/world/asia/south-china-sea-risks.html?mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjw-ZCKBhBkEiwAM4qfF0AZSfp6QKp7-GwCRzQd5ZclWPV5NTH1VoLu4Hxi0K4vDo5Ax3__1xoCBC4QAvD_BwE&gclsrc=aw.ds

would still be likely to use its superior navy to enforce its own claims in the South China Sea, as it has in the past against other regional players such as the Philippines and Vietnam.

In addition to the precedent being set by China in the South China Sea, the magnitude of the violation of international law is closer to that of the Scarborough Shoal rather than Okinotori. Under UNCLOS, “An archipelagic State may draw straight archipelagic baselines... up to a maximum length of 125 nautical miles”.⁷⁸ In the case of Okinotori, Japan’s baseline extends out to 200 miles.⁷⁹ On the other hand, China’s baseline in the South China Sea extends out to 500 miles, almost four times that of the absolute maximum allowed by UNCLOS.⁸⁰ By carving out an illegitimate sphere of influence of this size, China not only sets a precedent for artificially designating territory under international law, but it also signals that there need not be any limit on the size of that territory and that the overriding prerogative is national, not international interests.

In conclusion, the argument against making concessions that may impact U.S. defense posture in favor of international law is that despite many narratives, America is not a “norms entrepreneur”, and that states, in particular China, will follow international norms when it suits their best interest and violate them in kind.⁸¹ The next chapter will shift focus to the role Japan plays in great power competition as a U.S. ally and in countering the strategic threat posed by China.

⁷⁸ United Nations. *Convention on the Law of the Sea*, p. 36.

⁷⁹ J. McCurry, “Japan to spend millions on tiny islands 1,000 miles south of Tokyo”, *The Guardian*, Feb. 3, 2016. <https://www.theguardian.com/world/2016/feb/03/japan-spend-billions-yen-tiny-okinotori-islands-1000-miles-south-of-tokyo>

⁸⁰ Z. Cooper, “America’s Freedom of Navigation Operations Are Lost at Sea”, *Foreign Policy*, Jan. 8, 2019. <https://Foreignpolicy.Com/2019/01/08/Americas-Freedom-Of-Navigation-Operations-Are-Lost-At-Sea/>

⁸¹ B. Spector, “Norm-based leadership and the challenge of democratically elected authoritarians”, *Leadership*, vol. 17, no 2, (2021), pp. 230-239.

CHAPTER 5: THE EVOLVING ROLE OF JAPAN

China's modernization of its nuclear arsenal as well as its territorial expansions in the Pacific Island Chains and through the Belt Road Initiative have raised the alarm in U.S. and Japanese policy circles. In the U.S., this concern was a primary driver of the publication of the 2018 National Defense Review (NDR) which signaled a return to great power competition as the primary national security threat the U.S. is facing.⁸² With momentum growing in both Congress and across presidential administrations, the 2018 NDR was finally translated into policy with the Pacific Deterrence Initiative (PDI), a segment of the FY 2022 National Defense Authorization Act (NDAA) which seeks to appropriate funding for improving the posture, readiness, and capabilities of U.S. forces in East Asia to counter the "pacing threat" posed by China.⁸³

Japan identified and acted in the face of the growing threat by China even earlier than the U.S. In 2015, under the leadership of Japanese P.M. Shinzo Abe, Japan's parliament issued its updated guidelines for U.S.-Japanese defense cooperation, which were last updated in 1997. While the guidelines did not technically change any text of Japan's constitution regarding its pacifist self-defense-oriented military, it did put forth a new interpretation of Japan's constitution regarding its military posture.

In Article 9 of the Japanese constitution, it states that:

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... and that

⁸² U.S. Department of Defense. *Summary of the 2018 National Defense Strategy*, p. 1.

⁸³ Office of the Under Secretary of Defense (Comptroller). Department of Defense Budget Fiscal Year (FY) 2022. *Pacific Deterrence Initiative*. May 2021.

https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/fy2022_Pacific_Deterrence_Initiative.pdf

“land, sea, and air forces, as well as other war potential, will never be maintained.”⁸⁴

Article 9 has governed the direction of Japanese military strategy for the past 70 years, developing into what has become known as the “Sword and Shield” framework, in which Japan’s government has focused exclusively on defensive operations while relying on the U.S. for offensive capability. In instances where Japan’s Self-Defense Forces (SDF) have been forwardly deployed, their roles have been exclusively limited to peacekeeping operations or disaster relief.⁸⁵ The doctrine has become known as “Senshu Boei”, which translates from Japanese to “exclusively defensive self-defense”.⁸⁶

Under Senshu Boei, the Japanese prime minister must go through several congressional procedures to authorize Japan to use military force, with the exception being instances in which Japan has already been attacked by a foreign power. Unlike the U.S. doctrine of self-defense which allows for anticipatory action against materializing threats and presents the president with broad deference to decide when to initiate hostilities, Japan’s constitution has largely restricted the SDF from acting abroad in any foreign incursions.⁸⁷

The 2015 Guidelines marked a dramatic shift away from the Senshu Boei doctrine and paved the way for Japan to begin to use the SDF in offensive combat scenarios. Under the Guidelines, the new interpretation of the constitution states that the “increasingly complex security environment” in Northeast Asia, promulgated by the growing nuclear arsenal of North

⁸⁴ Japan Ministry of Foreign Affairs. *Treaty of Mutual Cooperation and Security Between Japan and the United States of America*.

⁸⁵ Japan Ministry of Foreign Affairs. *History of Japan’s Peacekeeping Operations*. n.d. <https://www.mofa.go.jp/policy/un/pko/pdfs/contribution.pdf>

⁸⁶ A. Catalinic, “Explaining Recent Changes in Japan’s Security Posture”, *Harvard Reischauer Reports*, n.d. https://scholar.harvard.edu/files/amycatalinac/files/catalinac_tsushin07.pdf

⁸⁷ C. Kress, “On the Principle of Non-Use of Force in Current International Law”, *Just Security*, Sept. 30, 2019. <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>

Korea and the Chinese threat to Japanese territories, demand that Japan work with the U.S. militarily to prevent contingencies in East Asia, “including situations when an armed attack against Japan is not involved”.⁸⁸ The document also references multiple times the importance of “flexible, and effective bilateral responses” to emerging threats, with the word “flexible” indicating that more deference will be accorded to Japan in determining which situations it may deploy the SDF.⁸⁹

It is worth noting that Japan’s shift towards a more pro-active SDF is not indicative of a Japan moving away from the U.S. as a provider of security or an attempt to hedge between the U.S. and China. Throughout the 2015 guidelines, when it is mentioned that the SDF will take on a larger role, it is in conjunction with supporting U.S. military operations currently in the region. In Japan’s annual white paper published in July 2021, the threat posed by China by both nuclear and maritime forces is listed as the primary concern facing the SDF, giving little reason to believe that Japan might be aligning with China as a result of expanding the role of its armed forces.⁹⁰

⁸⁸ Japan Ministry of Foreign Affairs. *The Guidelines for Japan-U.S. Defense Cooperation*. April 27, 2015. <https://www.mofa.go.jp/files/000078188.pdf>

⁸⁹ Japan Ministry of Foreign Affairs. *The Guidelines for Japan-U.S. Defense Cooperation*.

⁹⁰ Japan Ministry of Defense. White Paper. *Defense of Japan*. July 2021. <https://www.mod.go.jp/j/publication/wp/wp2021/pdf/R03010203.pdf>

CHAPTER 6: BACKGROUND ON INTERNATIONAL LAW AND THE USE OF FORCE

When examining how the use of force is governed by international law, Customary International Law (CIL) is often looked to as the body of authority governing such decisions.⁹¹ Contrasted with treaty law, CIL “consists of rules that come from ‘a general practice accepted as law’ and while it exists independent of treaty law, is still regarded as one of the highest forms of international law.”⁹² While CIL is generally accepted by most states as a legitimate source of international authority, disputes often arise when deciding how to interpret and practice its precedents.

One of the primary sources of CIL is the UN Charter. The UN Charter addresses the use of force in Article 2, when it states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.⁹³

Given that the first part of the principle states that “all members shall refrain... from the threat or use of force”, that leaves the second part, “in any other manner inconsistent with the purposes of the United Nations” as the authorizing text that nations can use force if it is consistent with the “spirit” of the UN Charter.

⁹¹ M. Schmitt, “Counter-Terrorism and the Use of Force in International Law”, *International Law Studies*, vol. 79 (2003) p. 38. <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1317&context=ils>

⁹² International Committee of the Red Cross. *Customary Law*. n.d. <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>

⁹³ United Nations. *Charter of the United Nations*. 1945. p. 3. <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

According to the UN Charter, there are two situations in which the use of force can be authorized in accordance with its laws. The first is when it is authorized by the UN Security Council (UNSC), established in Article 23.⁹⁴ In Article 24, it states that:

[the] responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts.⁹⁵

What this amounts to is that the UN may authorize the use of force by Security Council members if it believes that doing so is necessary for the maintenance of international peace and security. Examples of UNSC authorization to use force include the Korean War, the first Gulf War, and the interventions in Yugoslavia, Somalia, and Sierra Leone. The UNSC also is subject to veto by its members, and due to this constraint, it is rarely used.⁹⁶

The other method to authorize force following the UN Charter is if it is justified self-defense. Article 51 of the Charter states:

Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.⁹⁷

Two main questions that stem from the Article have been subject to legal debate. The first regards what scenarios constitute a right to individual or collective self-defense. These issues will be discussed in the following chapter, specifically in their relationship to the U.S.-Japan MDT. The second debated question, that the right is inherent “until” the UNSC has taken the

⁹⁴ United Nations. *Charter of the United Nations*. p. 6.

⁹⁵ United Nations. *Charter of the United Nations*. p. 7.

⁹⁶ “The UN Security Council”, Council on Foreign Relations, Aug. 12. 2021. <https://www.cfr.org/backgrounder/un-security-council>

⁹⁷ United Nations. *Charter of the United Nations*. p. 10.

necessary measures, is another subject of intense legal debate but is beyond the scope of this thesis.

According to the UN Charter, self-defense may be activated depending on whether or not a threat to its security is presented as “imminent”. It states:

The use of force to repel an attack or imminent threat of attack directed against oneself or others or a legally protected interest.⁹⁸

The UN Charter does not however offer a definition of imminence, providing flexibility for broader interpretations of self-defense that account for a state’s particular national security needs. As a result of allowing broad interpretations of imminence, several legal disputes have arisen over what the UN Charter would consider an imminent threat. Despite ambiguity over the definition of imminence, two main scenarios are typically considered instances that would justify the use of self-defense.

The first scenario is instances in which a state is directly attacked by another state. An example of responding to an armed attack would be Pearl Harbor, when U.S. forces were directly attacked by the Japanese, resulting in thousands of casualties. While the threshold for using force in this scenario is clear and lacks ambiguity, it also places states in a position where loss of life, perhaps on a massive scale, is a precondition for initiating self-defense. Because this outcome is unacceptable to most states, the UN Charter allows for another scenario where self-defense may be activated.

The other scenario for activating self-defense is pre-attack self-defense. Pre-attack self-defense is typically associated with three subcategories: anticipatory self-defense, preemptive

⁹⁸ International Committee of the Red Cross. *Self-Defense*. 1945. <https://casebook.icrc.org/glossary/self-defence>

self-defense, and preventative self-defense. These terms however exist outside the scope of the UN Charter and therefore establishing stable definitions of them has been difficult.

For example, NSC-68 defines preventative war as going to war when “a military attack not provoked by a military attack upon us” occurs and goes on to conclude that this is an unacceptable course of action.⁹⁹ At the same time NSC-68 also states it is a necessity to maintain forces ready to strike in the event of a Soviet offense, which many would say constitutes anticipatory or preemptive self-defense. Others, such as William James Haynes, General Counsel of the Department of Defense, stated in a memo that there was virtually no difference between any of the three terms.¹⁰⁰

For the purposes of this thesis, separate definitions will be used for the three terms. Anticipatory self-defense refers to the use of force in self-defense to halt an imminent armed attack by a state or a non-state actor.¹⁰¹ An example of this would include the Caroline Affair, which will be discussed more under the section on the U.S. and the use of force.¹⁰² Anticipatory self-defense is typically the most closely associated form of self-defense to that outlined in the UN Charter, and its condition of “imminence”, or the attack happening in the short-term.

Preemptive self-defense refers to the use of force in self-defense to halt a particular tangible course of action that the potential victim state perceives will shortly evolve into an

⁹⁹ U.S. National Security Council. *NSC 68: United States Objectives and Programs for National Security*. April 14, 1950. <https://irp.fas.org/offdocs/nsc-hst/nsc-68.htm>

¹⁰⁰ General Counsel, William Haynes to Secretary of Defense Donald Rumsfeld, Oct. 16, 2002, General Counsel of the Department of Defense, “Legal Distinction Between Preemption, Preventive Self-Defense, and Anticipatory Self-Defense”, Rumsfeld Libraries <http://library.rumsfeld.com/doclib/sp/2564/2002-10-16%20from%20William%20Haynes%20re%20Legal%20Distinction%20Between%20Preemption,%20Preventive%20and%20Anticipatory%20Self-Defense.pdf>

¹⁰¹ A. Deeks, *The Oxford Handbook of the Use of Force in International Law*, (Oxford University Press, 2015) pp. 664-665.

¹⁰² H. Miller, “British-American Diplomacy: The Caroline Case”, *Yale Law School*, n.d. https://avalon.law.yale.edu/19th_century/br-1842d.asp

armed attack against it.¹⁰³ An example of preemptive self-defense under this definition is the Six-Day War, when Israel launched an attack on Egyptian forces despite the lack of a direct attack or short-term mobilization of forces for an attack by Egypt. When Israel explained its justification for the attack, it cited Egypt closing the Straits of Tiran, its expulsion of Israeli diplomats, the general hostile relationship Egypt had with Israel, and the failure to resolve disputes over Arab territory through other courses of action.¹⁰⁴ The combination of hostile actions with Egypt's close proximity to Israel led the country to fear for its existence in a medium time-frame, thus leading it to decide on military self-defense as the appropriate strategy.

The final form of self-defense, preventative self-defense, can be defined as the use of force in self-defense to halt a serious future threat of an armed attack, without clarity about when or where that attack may emerge.¹⁰⁵ As mentioned in NSC-68, an example of preventative war would include a scenario in which the United States launched an attack on the Soviet Union without the Soviet Union demonstrating any dramatic change in its military posture that might indicate a nuclear or conventional offense. Support for preventative war has gained traction during the War on Terror, in particular against non-state actors, but has also been considered regarding rogue states like North Korea.¹⁰⁶

¹⁰³ S. Murphy, "The Doctrine of Preemptive Self-Defense", *Villanova Law Review*, vol. 50, no. 3 (2005) p. 701. <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1215&context=vlr#:~:text=In%2D%20stead%2C%20%22preemptive%20self,in%20an%20act%20of%20armed>

¹⁰⁴ J. Bowen, "1967 war: Six days that changed the Middle East", *BBC News*, June 5, 2017. <https://www.bbc.com/news/world-middle-east-39960461>

¹⁰⁵ The Executive Branch of the U.S. *National Security Strategy*. 2002 <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>

¹⁰⁶ A. Carter, and W. Perry, "If Necessary, Strike and Destroy: North Korea Cannot Be Allowed to Test This Missile," *Washington Post*, June 22, 2006. <https://www.belfercenter.org/publication/if-necessary-strike-and-destroy-north-korea-cannot-be-allowed-test-missile>

Historically, the United States has avoided binding itself to any specific legal doctrine governing when and how it can use force. There are however multiple sources the U.S. has derived authority from in the past, which help shed light on how it approaches these decisions.

One unofficial doctrine articulating how the U.S. uses force is former Secretary of Defense Casper Weinberger's 6 organizing principles.¹⁰⁷ Following the 1983 suicide truck bombing in Beirut that killed 241 members of the U.S. military, Weinberger gave a speech in which he listed 6 tests that should be applied when considering the use of force. By establishing constraints, the U.S. could avoid policy failures like the peacekeeping operations in Beirut. Weinberger's principles included only involving U.S. troops when vital national interests are at stake, having a commitment to win, establishing clearly defined objectives, deploying a force proportionate to said objectives, obtaining support of the American people, and only if all other options of using instruments of statecraft have been exhausted.

While Weinberger's requirements appear to be sound criteria, determining if a specific conflict meets them can be difficult, as many of the requirements are themselves matters of intense debate. For example, the question of what constitutes a "vital" interest can be difficult to determine.¹⁰⁸ Furthermore, the question of what it means to "win" when assessing a "willingness to win" is also often difficult to determine.

The Caroline Test. The more official source for self-defense in U.S. law comes from the historical precedent of the Caroline Doctrine, the basis of anticipatory self-defense¹⁰⁹. In 1837, as a result of backlash to British presence in North America, settlers in upper Canada revolted

¹⁰⁷ C. Weinberger, "The Uses of Military Power", *National Press Club*, Washington, D.C. Nov. 28, 1984. <https://www.airforcemag.com/article/0104keeperfile/>

¹⁰⁸ R. Lock-Pullan, "The U.S. Way of War and the "War on Terror"", *Politics and Policy*, vol. 34, no. 2 (2006) pp. 374-399

¹⁰⁹ Miller, Hunter. "British-American Diplomacy: The Caroline Case", Yale Law School, n.d. https://avalon.law.yale.edu/19th_century/br-1842d.asp

against British forces. Having just fought two wars against Britain, many Americans were sympathetic to the rebel's cause, yet the U.S. government remained officially neutral in the conflict. This didn't stop American citizens from assisting the rebels primarily through the provision of supplies and weapons. One method of delivering these provisions was by transporting them by steamboat.

The British eventually discovered that a particular Steamboat, the *Caroline*, was notoriously responsible for aiding the Canadian rebels. In response, the British, assisted by Canadian loyalists, crossed into U.S. territory and attacked the docking area where the *Caroline* was stationed. The British seized the ship, set it on fire, and then proceeded to sail it over the Niagara Falls. One American citizen, a watchmaker named Amos Durfee, was killed in the process.

Before the British forces could return across the border, American soldiers captured the unit and promptly imprisoned them. The resulting fallout from the event led to a major diplomatic fallout with the UK, with whom relations were already strained following the War of 1812. While Britain claimed the incident was an act of self-defense to protect future attacks on its territory, many American citizens saw it as an act of war and were calling for the federal government to enter yet another conflict with the UK. President Martin van Buren, who was at the time facing election, sought to avoid war, but was unable to resolve the dispute.

After van Buren lost reelection, President William Henry Harrison dispatched Secretary of State Daniel Webster to reset negotiations with the British and attempt to find a solution that would prevent war. Recognizing that the *Caroline* Steamboat was actively supporting rebel units that were a direct threat to British territories, Webster sent a letter to the British military leadership articulating the U.S. federal government's official view of the incident. Webster stated

in the letter that Britain had the right to respond to what they perceived as an “instant” threat to their national security, so long as they kept their response proportionate in that it did not extend beyond the mission parameters of neutralizing the instant threat. His letter reads:

The necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation ..., and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.¹¹⁰

This letter would go on to be known as the Caroline Doctrine and continues to strongly influence American foreign policy almost two centuries later as forming the basis of anticipatory self-defense. The British accepted Webster’s interpretation of the conflict and apologized for the loss of American life. The U.S. in turn accepted Britain’s apology and released the British prisoners, resolving the Caroline Affair.

The War on Terror and the Imminence Doctrine. Following the terrorist attacks on September 2001, the U.S. underwent a drastic shift in its approach to self-defense. The 9/11 attacks instantly elevated international terrorism as the primary national security threat, yet the U.S. lacked the appropriate legal architecture for dealing with the shift. While the Caroline Doctrine and UN Charter were primarily established to serve as a framework for inter-state disputes, there wasn’t a strong foundation for addressing non-state actors. This was particularly problematic in terms of identifying an imminent threat. The mobilization of nuclear or large conventional forces by an adversarial state is difficult to accomplish without being detected by U.S. intelligence and reconnaissance efforts. Identifying a terrorist group about to execute an

¹¹⁰ Miller, Hunter. “British-American Diplomacy: The Caroline Case”, Yale Law School, n.d. https://avalon.law.yale.edu/19th_century/br-1842d.asp

attack is much more difficult, and by the time such plots may be identified as occurring, it is too late for the target state to respond.

In the 2002 National Security Strategy, the Bush Administration sought to redefine the definition of imminence as per the Caroline Doctrine, to expand the definition to include a broader spectrum of threats that would activate self-defense. It states:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.¹¹¹

By drawing a distinction between visible and nonvisible threats to national security, the 2002 NSS functionally expands the definition of imminence to include threats throughout space and time, without any requirement of an identifiable short- or medium-term risk of attack.

This expansion has costs and benefits. In the current national security environment, in which threats can materialize at a moment's notice, having a broad definition of imminence can allow a state the flexibility and speed it needs to keep its citizens safe and neutralize attacks before they result in significant loss of life. Maintaining this flexibility however can lead to conflicts in the international legal system, the same liberal order the U.S. has championed since the end of WW II. The next chapter will address how the U.S.' broad interpretation of

¹¹¹ U.S. Department of State. National Security Strategy. *National Security Strategy: Prevent Our Enemies From Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*. 2006. <https://2001-2009.state.gov/r/pa/ei/wh/15425.htm>

imminence may impact its relationship with allies who hold a stricter interpretation of what conditions may activate self-defense.

CHAPTER 7: U.S. AND JAPANESE FREEDOM OF NAVIGATION OPERATIONS

As mentioned in the previous chapter, the U.S.-Japan alliance has been evolving as it seeks to meet the demands of a transforming security environment. This evolution was largely catalyzed by the 2015 U.S.-Japan Defense Guidelines, issued by the Japanese Ministry of Foreign Affairs, which established a broader role for Japan in influencing the regional security environment outside of affairs that directly affected Japan's core national security interests, including working with the U.S. to meet these objectives. In fulfilling the traditional "sword and shield" framework, the U.S. and Japan have continued to increase cooperation on defensive efforts, and Japan has become one of the U.S.'s closest allies in terms of bilateral missile defense cooperation.¹¹²

The U.S. and Japan have also been expanding cooperation beyond traditional defensive efforts. One area in particular that has emerged as a growing centerpiece of the alliance in the past decade has been joint Freedom of Navigation Operations (FONOPs). Established in 1979, the U.S. Department of Defense defines FONOPs as a "two-pronged complementary strategy to maintain the global mobility of U.S. forces and unimpeded commerce by protesting and challenging attempts by coastal States to unlawfully restrict access to the seas."¹¹³ As East Asia has grown in importance to the global economy, FONOPs in East Asia have also grown in importance as the U.S. continues to maintain open access to key shipping lanes of commerce (SLOCs) to allow for the free flow of international trade.

¹¹² U.S. Department of Defense. *Missile Defense Review*. 2019.
<https://media.defense.gov/2019/Jan/17/2002080666/-1/-1/1/2019-MISSILE-DEFENSE-REVIEW.PDF>

¹¹³ U.S. Department of Defense. *Report to Congress "Freedom of Navigation"*. 2017.
<https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053>

Beginning in 2015, as part of the 2015 U.S.-Japan Defense Guidelines, the U.S. and Japan began conducting joint FONOPs in the South China Sea in response to China's territorial expansion and malicious activities.¹¹⁴ In addition to routine patrols, the U.S. and Japan also began conducting naval exercises in the South China Sea.¹¹⁵ Since 2015, the frequency of these operations has increased. In 2019, the U.S. and Japan conducted a record 9 FONOPs, a number which was once again surpassed in 2020 with 13.¹¹⁶ As China continues to increase its aggressive island building and territorial incursions into international and sovereign waterways, U.S., Japanese, and Chinese navies are increasing in proximity to each other when conducting military operations.¹¹⁷ Japan's participation in FONOPs has already increased the role of the Japanese Maritime Self-Defense Force (JMSDF) in Pacific security affairs to a level unseen since WW II. With the competition between the U.S. and China also in full effect, Japan's security forces will face unprecedented new challenges as they work with the U.S. to counter China's growing influence in the region.

Gray Zone Warfare and Freedom of Navigation

With the U.S.-Japan alliance facing a plethora of new roles and missions, the two states are sailing into uncharted legal territory in terms of the rules governing these new missions.

Japan's pacifist doctrine has defined its role in East Asian security affairs for almost a century,

¹¹⁴ M. Rapp Hooper, "All in Good FON: Why Freedom of Navigation Is Business as Usual in the South China Sea", *Foreign Affairs*, Oct. 12, 2015. <https://www.foreignaffairs.com/articles/united-states/2015-10-12/all-good-fon>

¹¹⁵ A. Panda, "A First: Japanese and US Navies Hold Exercise in South China Sea" *The Diplomat*, Oct. 31, 2015. <https://thediplomat.com/2015/10/a-first-japanese-and-us-navies-hold-exercise-in-south-china-sea/>

¹¹⁶ J. Panter, "Will Americans Die for Freedom of Navigation?", *Foreign Policy*, April 6, 2021. <https://foreignpolicy.com/2021/04/06/freedom-of-navigation-operation-china-us-maritime-law/>

¹¹⁷ "Taiwan says 19 Chinese warplanes entered air defence zone", *BBC News*, Sept. 6, 2021. <https://www.bbc.com/news/world-asia-58459128>

and in taking on new missions, the current legal architecture for governing U.S.-Japan joint military operations has yet to be developed.

The driving force behind the need for a legitimate legal architecture is the emergence of “gray zone” operations by U.S. adversaries, in particular China. Operating in the space between total warfare and peacetime, adversaries like China have used the gray zone as an asymmetrical counter to U.S. conventional superiority by exploiting U.S. adherence to liberal institutionalism; they have done this by conducting military operations that technically aren’t illegal under international law but also aren’t quite legal or are military excursions that don’t quite cross the threshold into war. Examples of gray zone operations include China’s island building in the South China Sea, which despite The Hague Tribunal’s decision that it is outside the confines of UNCLOS, maintains its status in the gray zone as China advances its own legal counterarguments to justify continued construction. Another example are China’s aerial excursions into Taiwan airspace, which despite crossing into another sovereign state’s territory, don’t reach the threshold of an action justifying a declaration of war due to the lack of any kinetic attack by Chinese planes. The essence of the gray zone strategy is an action that imposes a cost in which the target state has limited means to respond short of imposing a much larger cost, in most cases military action, which may be perceived as disproportionate to the initial action.

The first definition of the “gray zone” by DOD was published in a 2015 Special Operations Command White Paper, coincidentally around the same time as the publishing of the new U.S.-Japan Defense Guidelines. The White Paper describes the “gray zone” as:

The competitive interactions among and within state and non-state actors that fall between the traditional war and peace duality” and are “characterized by

ambiguity about the nature of the conflict, opacity of the parties involved, or uncertainty about the relevant policy and legal frameworks.¹¹⁸

The U.S.'s alliance system is one of its greatest assets in maintaining international stability. However, given the uncertainty of legal frameworks with alliances changing to adapt to a transforming security environment, gray zone tactics by adversaries present a significant challenge to the maintenance of the U.S. alliance framework. Furthermore, the U.S. Army War College defines gray zone operations as:

Activities by quasi-revisionist states that seek to alter the status quo of the international order through coercive military or political means just below a threshold that would elicit a conventional military response.¹¹⁹

Both definitions are useful for understanding the current legal uncertainties in the U.S.-Japan alliance that this thesis seeks to address. While gray zone operations are currently conducted by numerous states, including Russia, this thesis will exclusively examine Chinese gray zone operations in the East and South China Seas.

It is important to note that gray zone strategies are not something new but have existed throughout history in the form of psychological warfare, deliberate subversion of rival political systems, and covert and paramilitary operations.¹²⁰ However, given the return to great power competition outlined in the 2018 National Defense Strategy, gray zone operations have gained an elevated status as one of the most pressing national security issues facing the U.S.¹²¹

¹¹⁸ U.S. Special Operations Command. *The Gray Zone*. Sept. 9, 2015. <https://www.soc.mil/swcs/ProjectGray/Gray%20Zones%20-%20USSOCOM%20White%20Paper%209%20Sep%202015.pdf>

¹¹⁹ M. Mazarr, "Mastering the Gray Zone: Understanding a Changing Era of Conflict", *U.S. Army War College, Strategic Studies Institute*, Dec. 2, 2015. <https://press.armywarcollege.edu/monographs/428/>

¹²⁰ "Gaining Competitive Advantage in the Gray Zone", *RAND Corporation*, 2019. https://www.rand.org/pubs/research_reports/RR2942.html

¹²¹ U.S. Department of Defense. *Summary of the 2018 National Defense Strategy* p. 2.

Several recent official DOD publications have sought to address this issue. In the 2017 National Security Strategy, it states that:

The central challenge to U.S. prosperity and security is the reemergence of long-term, strategic competition by what the National Security Strategy classifies as revisionist powers. It is increasingly clear that China and Russia want to shape a world consistent with their authoritarian model—gaining veto authority over other nations’ economic, diplomatic, and security decisions.¹²²

While the 2017 NSS does not directly reference the gray zone, it does shed important light on policymaker’s thoughts regarding Chinese and Russian strategy to counter U.S. hegemony.

According to the NSS, China and Russia’s objective is to shape the world consistent with their authoritarian model. A significant advantage to the authoritarian model of these states is that they have greater flexibility than democratic countries when it comes to following the law. This is the foundation of the gray zone strategy. By disregarding international norms and legal precedents, China and Russia can exploit democracies like the U.S. who follow these norms due to their strong commitment to the rule of law.

The 2018 National Defense Strategy also refers to the gray zone. While the 2018 NDS also does not explicitly use that term, it does functionally refer to its definition, stating:

Both revisionist powers and rogue regimes are competing across all dimensions of power. They have increased efforts short of armed conflict by expanding coercion to new fronts, violating principles of sovereignty, exploiting ambiguity, and deliberately blurring the lines between civil and military goals.¹²³

Shortly after the publication of the 2018 NDS, several U.S. allies also began to incorporate gray zone competition into their national defense strategies, including France, Australia, Germany,

¹²² U.S. Department of Defense. *Summary of the 2018 National Defense Strategy* p. 2.

¹²³ U.S. Department of Defense. *Summary of the 2018 National Defense Strategy* p. 2.

Great Britain, and Indonesia.¹²⁴ For example, France’s Ministry of Defense included an entire chapter on Gray Zone activities in their Defense Strategy in the Indo-Pacific document, and Australia’s 2020 Defense Strategic Update incorporated “gray zone activities” into its lexicon.¹²⁵

Since the emergence of the gray zone as a national security threat, several analysts and scholars have been working to conceive of strategic responses by the U.S. Given that the gray zone cannot be reduced to a single action, but rather encompasses an entire domain of adversarial actions, it is difficult to recommend a single silver bullet that the U.S. can follow to counter Chinese tactics. One of the closest recommended courses of action comes from the RAND Corporation, which outlines a theory of success for policy responses in the gray zone. It states:

The combination of intensified multilateral pressure, the identification of specific red lines, the credible commitment of U.S. military and economic power, and expanded diplomatic efforts to address Chinese and Russian concerns can shift the risk and cost calculus for certain gray zone actions onto the aggressor, partly by playing to Chinese and Russian desires to preserve their international status and avoid regional balancing.¹²⁶

The RAND Corporation theory of success is unique in that establishes an overarching strategy for the U.S. to counter Chinese activity in the gray zone. By applying diplomatic pressure on China in response to its quasi-legal operations that show little regard for the values of the liberal international order, the U.S. can rally international support against China thereby reducing its standing in the global community. While China may have little appreciation for following the

¹²⁴ "Gaining Competitive Advantage in the Gray Zone", RAND Corporation, 2019. https://www.rand.org/pubs/research_reports/RR2942.html

¹²⁵ France Ministry of Defense. *France’s Defense Strategy in the Indo-Pacific*. 2019. https://apcss.org/wp-content/uploads/2020/02/France-Defence_Strategy_in_the_Indo-Pacific_2019.pdf and Australia Department of Defense. *2020 Defence Strategic Update*. 2020. <https://www1.defence.gov.au/about/publications/2020-defence-strategic-update>

¹²⁶ "Gaining Competitive Advantage in the Gray Zone", RAND Corporation, 2019. https://www.rand.org/pubs/research_reports/RR2942.html

norms established by international law, it does value its reputation amongst other countries who do follow those norms. By functionally flipping the gray zone strategy on its head, the U.S. can call attention to the ways in which Chinese actions undermine rule of law and make the case to the international community that those actions pose a fundamental threat to the liberal and economic norms many nations benefit from.

While the RAND theory of success is useful in providing a direction for the U.S. to head in, it ultimately concedes that in order to implement recommendations such as demonstrating the credible commitment of U.S. military power and establishing specific redlines, the U.S. requires a variety, or a buffet of options for determining tangible policy responses to gray zone incursions. This can be difficult given the immense variety of the shape and scope of gray zone operations. The magnitude of the impact of gray zone operations on U.S. national security can vary greatly, ranging from persistent, relatively minor examples such as China sailing its naval vessels from the Senkaku, to major, core national interests such as China seizing the Senkaku.

One of the ways the U.S. prepares its responses to gray zone activities is by having the Department of Defense run war game simulations for determining the possibilities of contingencies the U.S. may encounter.¹²⁷ However, the war games and methodological frameworks used to predict these scenarios possess structural indeterminacy weaknesses, in which the war games are useful in revealing logics or motives but fail to establish tangible scenarios for which they may be applied.¹²⁸ Creating a specific strategy for countering threats in the gray zone therefor remains elusive, leaving policymakers with the initial legal uncertainty the gray zone presents in the first place.

¹²⁷ M. Caffrey, "On Wargaming" *United States Naval War College*. 2019. <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1043&context=newport-papers>

¹²⁸ J. Hanley, "On wargaming: a critique of strategic operational gaming", Dissertation, *Yale University*, 1991. <https://www.worldcat.org/title/on-wargaming-a-critique-of-strategic-operational-gaming/oclc/50277133>

While presenting a tangible list of policy options for gray zone military operations is outside the scope of this paper, it does seek to address establishing an effective framework that can provide the flexibility the U.S. needs to effectively utilize a buffet of options so that it can successfully pursue effective courses of action in addressing gray zone situations and threats. Maintaining an effective alliance framework is one way that the U.S. can maximize the effectiveness and credibility of its responses, through both burden sharing and joint military operations. With Japan being the U.S.'s largest military and economic partner in East Asia, ensuring a proper legal framework for military operations will be necessary for establishing effective gray zone responses given their inherent relation to legal uncertainty.

Japanese Senshu Boei Doctrine

Perhaps the greatest legal challenge the U.S. and Japan face entering the period of great power competition is the inconsistency between the two states regarding their doctrines governing the use of force. Given that gray zone operations frequently involve military operations, having a clear legal basis for engaging in those operations will be necessary for determining what military responses the U.S. and Japan should pursue in response to Chinese activities. By having separate criteria for what conditions may authorize a military response, the U.S. and Japan are at risk of losing synergy in their responses to gray zone activities. Part of the advantage of deploying gray zone tactics is that by the time the target states have realized what the appropriate course of action is, the state deploying the tactic has already achieved its objectives. This makes speed in responding to gray zone activities an essential factor in establishing an effective response.

As demonstrated in the previous chapter, the U.S. and Japan have radically different interpretations over what scenarios may authorize their militaries to use force in instances of self-defense. While the U.S. has traditionally held to the Caroline Doctrine in requiring an “imminent” threat to activate self-defense, this definition has been broadened following the September 11th attacks, to shift from a traditional definition of anticipatory self-defense, to one of preventative self-defense, in which no short-term time horizon is necessary for a threat to be considered imminent. Additionally, the U.S. accords broad deference to the President in determining when force should be used, granted under Article 2 of the U.S. Constitution.¹²⁹

Japan on the other hand has a much narrower interpretation of which scenarios of self-defense authorize the use of force, in large part influenced by its pacifist history. Japan’s doctrine of Senshu Boei, exclusively defensive self-defense, “holds that it will not employ defensive force unless an armed attack is mounted on Japan by another country, and even in such cases, only the minimum force necessary will be employed to defend itself.”¹³⁰ Japan’s executive branch’s authority to use force also resides on the opposite side of the spectrum from that of the U.S., as they must go through several parliamentary procedures to approve deployment of the JSDF, even with the expanded 2015 U.S.-Japan Defense Guidelines.¹³¹

As a byproduct of the Senshu Boei doctrine, the Japanese government also prescribes to a narrower definition of an armed attack, functionally eliminating any scenario in which pre-attack self-defense can be used. For Japan, an armed attack “refers to an “organized and premeditated

¹²⁹ U.S. Constitution. Article 2. <https://constitutioncenter.org/interactive-constitution/article/article-ii>

¹³⁰ C. Yasuakai, “Japan’s Security Outlook: Its Implications for the Defense Policy”, *National Institute for Defense Studies*, Joint Research Series No.5, 2011.

http://www.nids.mod.go.jp/english/publication/joint_research/series5/pdf/5-11.pdf

¹³¹ K. Sugawa, “Time to Pop the Cork: Three Scenarios to Refine Japanese Use of Force”, *Brookings*, July 1, 2000. <https://www.brookings.edu/research/time-to-pop-the-cork-three-scenarios-to-refine-japanese-use-of-force/>

external attack on Japan.”¹³² By adhering to this definition, Japan maintains strict limits on when it can activate its self-defense forces, potentially to the detriment of its own national security.

This strict limitation poses unique problems for Japan when it comes to contesting Chinese gray zone operations. Because operations in the gray zone take place in between the legal space of peacetime and military operations, Japan is left with the options of using law enforcement to respond to Chinese paramilitary activities, which have significantly less capabilities than the SDF, or waiting for the Diet to declare a situation of armed conflict, in which Chinese forces may have already achieved their objectives. With the advancement of technology, this conundrum will only become more persistent, especially as gray zone tactics begin to be applied to the cyber and space domains. In the short-term, the most relevant scenario for the Japanese SDF will continue to be the Senkaku Islands, where the Chinese Coast Guard has ventured into Japanese territorial waters 88 times between since the start of 2021.¹³³

As mentioned above, Japan’s strict adherence to Senshu Boei limits when the JSDF can be deployed. The time it will take the Prime Minister to consult with the Diet makes it highly unlikely that this will occur in time to respond to a contingency calling on the JSDF to respond. This stringent requirement not only applies to the JSDF when entering into hostilities, but also for activities such as surveillance operations and defense posturing. The consequence of this process is that Japan must rely on law enforcement to respond to the Chinese Navy in any maritime gray zone scenario unless the Diet issues a declaration of war. This puts Japan at a significant strategic disadvantage when facing the full spectrum of China’s naval capabilities.

¹³² Prime Minister of Japan and His Cabinet. J. Koizumi. *Reply to the Questions Concerning an Armed Attack Submitted by Seiichi Kaneda, a Member of the House of Representatives*. May 24, 2003.

¹³³ B. Lendon, “Japan’s defense minister draws red line in island dispute with China”, *CNN*, September 16, 2021. <https://www.cnn.com/2021/09/15/asia/japan-defense-minister-kishi-china-interview-intl-hnk-ml/index.html>

There are four main problematic scenarios that arise due to this limitation of Japanese authority to activate the JSDF. The first scenario is that Japan is constantly in a situation where it is uncertain if Chinese naval incursions into the East China Sea constitute gray zone operations or are an act of war that would require activating the JSDF. While China routinely sails its naval vessels into the Senkaku waters, the majority of these patrols are conducted by the Chinese Coast Guard, with Chinese naval vessels stationed outside the Senkaku EEZ to provide support if necessary.¹³⁴ Japan's standard response has been to deploy its own coast guard but is constantly left uncertain if it will be dealing with China's coast guard or the PLA Navy.

The second scenario is that Japan is uncertain when to end law enforcement operations by the coast guard and when to start operations by the maritime SDF (JMSDF). For example, the most common Chinese gray zone operation is to use maritime law-enforcement vessels to enter another states territorial waters. Their presence establishes that China is attempting to control access to the area and waits for the target state to decide how to handle the situation, with military action or with its own law enforcement¹³⁵. Due to the nature of gray zone operations being below the threshold of war, Japan has almost entirely relied on coast guard law enforcement vessels to respond to Chinese incursions, as deploying the JMSDF may lead to escalation with nearby PLA naval forces.

This limitation constantly puts Japanese sailors at risk. Even if the JMSDF were to be deployed, according to the Police Duties Execution Act of 1948, they are not permitted to use weapons unless directly attacked or if they have authorization from the Diet.¹³⁶ Every time Japan

¹³⁴ "Chinese coast guard ships sail in Japanese waters near Senkakus", *The Japan Times*, June 26, 2021. <https://www.japantimes.co.jp/news/2021/06/26/national/china-coast-guard-senkakus-2/>

¹³⁵ R. Martinson, "China's Great Balancing Act Unfolds: Enforcing Maritime Rights vs. Stability", *The National Interest*, Sept. 11, 2015. <https://nationalinterest.org/feature/chinas-great-balancing-act-unfolds-enforcing-maritime-rights-13821?page=0%2C1>

¹³⁶ Japan Ministry of Justice. *The Police Duties Execution Act*. July 12, 1948. http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=02&id=2229

sends a vessel to respond to Chinese territorial incursions, it is functionally a paper tiger, and the men and women stationed on those ships are left crossing their fingers that Chinese forces will back down and not escalate. It would also be naïve to assume that Chinese naval forces are unaware of this limitation and would not exploit the situation for their own strategic benefit.

The third scenario entails gray zone operations where speed is a factor in accomplishing objectives. By leaving the decision of when to use armed force up to the Diet in Tokyo, China is aware that any military response by Japan will have to go through a long cycle of bureaucracy, allowing it to take advantage of delays while a response by Japan is authorized. This phenomenon is magnified in the gray zone when legal ambiguity can cause significant confusion in the political sphere over what national responses should be, which leaves Japan in a purely reactive position and surrenders the initiative to China.

The fourth scenario is that even if Japan were to go through the legitimate process of activating the JMSDF, requests for U.S. assistance through Article 5 of the U.S.-Japan MDT may be delayed. In Article 5, it states that “each party” must recognize that an armed attack is dangerous to Japan’s “peace and safety”.¹³⁷ If the U.S. were to determine that a gray zone attack such as the seizing of the Senkaku did not reach the threshold of triggering Article 5, the JMSDF would once again be left in a law enforcement position short of authorization by the Diet.

Not only is the triggering of Article 5 left up to U.S. military decision-makers, but it is also at the whims of the current U.S. political climate. The same ambiguity that Japanese politicians face when grappling with a gray zone dilemma also affects the way that U.S. politicians will decide how to respond, and due to its threshold below the level of outright aggression, the U.S. may decline to activate Article 5 to avoid escalation with China. In the case

¹³⁷ Japan Ministry of Foreign Affairs. *Treaty of Mutual Cooperation and Security Between Japan and the United States of America*

of the Senkaku, if China were to seize the islands in a fait accompli, the U.S. may not see the uninhabited islands as valuable enough to enter into hostilities with China, or at the very least spend significant time debating its response at which time China will already have established military control of the islands.

This scenario is not without historical precedent. In February of 2014, Ukraine made claims describing “well-planned” Russian aggression in the Crimea, and in a matter of days Ukrainian president Viktor Yanukovich had been removed from power and within a week, Russian forces were spread throughout the peninsula.¹³⁸ Given Russia’s hybrid warfare tactics as a precursor and component of its invasion, U.S. politicians failed to act given that the status of the invasion as an armed attack was unclear, and by the time Washington realized what was occurring, Russia had successfully established control of the Crimea.¹³⁹ While the U.S. did not have a MDT with Ukraine as it does with Japan, it is worth noting that security assurances were provided to Ukraine under the Trilateral Statement of 1994 when Ukraine agreed to give up its nuclear weapons.¹⁴⁰ If China continues to conduct gray zone operations in the East China Sea with impunity, it could cause concern in Japan over the credibility of U.S. security assurances.

The ambiguity of the U.S.’s self-defense policy since it departed from the Caroline Doctrine and shifted to one of preventative war further adds to the uncertainty in this scenario. While preventative war has had benefits for articulating when the U.S. will use force in the War on Terror, it’s applicability to combat scenarios dealing with state actors is less established. The preventative war doctrine accords decision-makers with a high degree of flexibility in entering

¹³⁸ Ukraine Ministry of Foreign Affairs. *10 facts you should know about Russian military aggression against Ukraine*. Dec. 2019, <https://mfa.gov.ua/en/10-facts-you-should-know-about-russian-military-aggression-against-ukraine>

¹³⁹ S. Pifer, “Ukraine, Russia and the U.S. Policy Response”, *Brookings*, June 5, 2014. <https://www.brookings.edu/testimonies/ukraine-russia-and-the-u-s-policy-response/>

¹⁴⁰ P. Cantelon, “The US-Russia-Ukraine Trilateral Statement and Annex” *The Atomic Archive*, Jan. 14, 1994. <https://www.atomicarchive.com/resources/documents/deterrence/trilateral.html>

armed conflict, and when responding to a non-state threat, this has allowed the U.S. to act to defend its national security in scenarios where stricter interpretations of the UN Charter on the use of force may not have allowed. However, it also offers decision-makers the flexibility to decline to deploy military forces, as was the case with the Ukraine.

In the case of Syria, the U.S. articulated a red line that if Syrian President Bashir Al-Assad used chemical weapon, the U.S. would respond with force. When Assad did use chemical weapons and the U.S. did not follow through on its commitment to use force, it hurt the credibility of U.S. commitments.¹⁴¹ In matters of collective self-defense, ambiguity over U.S. commitments may serve to incentivize Chinese aggression if it believes the U.S. will see the costs of challenging Chinese military incursions as outweighing the benefits.

As China's military buildup continues, such a seizure involving the Senkaku or another territory in East Asia in which the U.S.-Japan alliance would play a role cannot be ruled out. While the U.S. places significant resources into maintaining the credibility of its extended deterrence guarantees, it is easy to see how Chinese strategic planners may believe that Washington would not find it in its best interest to enter into armed conflict to defend the uninhabited Senkaku islands. For Japan, any seizure may be seen as a gray-near-black situation while the U.S. may see it as gray-near-white. This divergence in strategic thinking is a vulnerability that China has already demonstrated it is eager to exploit, and as its naval presence becomes more normalized throughout the Indo-Pacific, the incentive to become more aggressive with its gray zone operations will only grow stronger.

¹⁴¹ M. Singh, "Red Line Revisited: The Costs and Benefits of Not Striking Syria", *The Washington Institute*, April 22, 2016. <https://www.washingtoninstitute.org/policy-analysis/red-line-revisited-costs-and-benefits-not-striking-syria>

In the increasingly dynamic Asian security environment, U.S. and Japanese Freedom of Navigation Operations will continue to be critical in promoting regional stability and ensuring open access to some of the world's most important trading networks. Chinese gray zone operations pose a direct threat to these operations by exploiting core vulnerabilities in the alliance. By enhancing legal interoperability, the U.S. and Japan can better address the gray zone threat posed by China. The next chapter will address methods for the U.S. and Japan to accomplish this objective.

CHAPTER 8: PATHWAYS TO LEGAL SYNCHRONIZATION

To resolve the issue of legal divergence with Japan on gray zone operations, the U.S. could seek to synchronize U.S.-Japan legal defense standards to make their self-defense doctrines more interoperable when managing Chinese gray zone coercion. There are several steps that the U.S. and Japan can take to improve legal interoperability, which is the ensuring that organizations operating under different legal frameworks, policies and strategies are able to work together.¹⁴²

One action would be to deepen exchanges and promote a shared understanding about the gaps in legal doctrines between the U.S. and Japan among Japan's National Security Secretariat and the U.S. National Security Council.¹⁴³ By expanding coordination at the highest levels of government, the U.S. can ensure that top decision makers are aware of the vulnerabilities posed by China in the gray zone.

Another action would be to assist Japan in the creation of their Law of War Manual, similar to how the Department of Defense has its Law of War Manual to provide legal guidance to the armed forces.¹⁴⁴ Currently Japan has no such document, meaning that legal doctrines of military conduct are subject to the status quo political climate. By working with Japan to publish a Law of War Manual, clarity can be established in areas where there is currently ambiguity. Additionally, legal interoperability entails recognizing that there will inevitably be inconsistencies with allies and figuring out how to work with those differences. With a legal

¹⁴² "Legal Interoperability", *National Interoperability Framework Observatory*. n.d. <https://joinup.ec.europa.eu/collection/nifo-national-interoperability-framework-observatory/glossary/term/legal-interoperability>

¹⁴³ Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions" p. 21.

¹⁴⁴ Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions" p. 21.

manual to reference, the U.S. and Japan can develop solutions to those inconsistencies to ensure that operational doctrines are still in sync despite differences.

One major uncertainty the U.S. and Japan will have to address is what conditions are sufficient to activate the collective self-defense pact of the alliance through Article 5. The U.S. maintains that preventative and preemptive interpretations of self-defense are sufficient to activate Article 5, while Japan holds a stricter interpretation of requiring the declaration of an armed attack, and in some very limited scenarios the possibility of anticipatory self-defense.

One important international court case that has direct implications for this understanding of self-defense is the U.S. v. Nicaragua. When it was discovered that the U.S. was supporting the Nicaraguan rebel Contras against the socialist Sandinista government, the Sandinistas sued the U.S. in the International Court of Justice (ICJ) for violating Nicaragua's sovereignty.¹⁴⁵ While the U.S. did not participate in the proceedings, arguing that the ICJ lacked standing to hear the case, the court did investigate if U.S. had a legitimate argument for intervening.

The ICJ findings discovered that Nicaragua had been supplying insurgents in El Salvador, a U.S. ally, with weapons and resources to fight the El Salvador government.¹⁴⁶ The court found however that the U.S. response lacked proportionality, and that "the alleged supply of arms may be relied on as justifying the exercise of the right of collective self-defence".¹⁴⁷ The court went even further, finding that not only that U.S. activation of collective self-defense in this specific instance lacked standing, but that "there is no rule in customary international law

¹⁴⁵ Nicaragua v. United States of America, Judgement of 27, Findings, International Court of Justice, June 1986. <https://casebook.icrc.org/case-study/icj-nicaragua-v-united-states>

¹⁴⁶ "The Iran Contra Affairs » Nicaragua: U.S. Support for the Contras", *Brown University*. n.d. https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/n-contrasus.php

¹⁴⁷ Nicaragua v. United States of America, Judgement of 27, Judgement, International Court of Justice, June 1986 <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>

permitting another state to exercise the right of collective self-defense on the basis of its own assessment of the situation.”¹⁴⁸

The precedent set by Nicaragua is integral to understanding the legal dynamics between the U.S. and Japan when it comes to self-defense. Japan’s *Senshu Boei* is closely in-line with the court’s decision in Nicaragua, holding that only by directly consulting with the U.S. can it request military assistance under Article 5. The U.S., on the other hand, has repeatedly rejected the court’s decision in Nicaragua, arguing that “collective self-defense of a State must proceed with that State’s consent, although this consent need not necessarily be expressed in the form of an explicit request.”¹⁴⁹ Under this interpretation, the U.S. could functionally activate Article 5 without consulting Japan.

Additionally, the U.S. could also simply bypass the MDT altogether under the doctrine of preventative self-defense in order to neutralize a threat to U.S. forces stationed in Japan, and not use an armed attack on Japan as legal justification for doing so.¹⁵⁰ This rationale has become the legal basis for what has become known as the “bloody nose” strategy, which is where the U.S. would conduct limited military strikes on a North Korean “missile site or military base” if North Korea were to launch an ICBM into Japanese territory.¹⁵¹ The Bloody Nose strategy would make it easier for the U.S. to get drawn into war with North Korea as a result of a missile falling into the sea and being interpreted as an attack on Japanese territory. Such an interpretation is unlikely

¹⁴⁸ *Nicaragua v. United States of America*, Judgement of 27, Judgement,

¹⁴⁹ U.S. Department of Defense. *Law of War Manual*. Dec. 2016

<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

¹⁵⁰ C. Dunlap, “The “Bloody Nose” strategy debate: why it’s more complicated than some think”, *Duke University*, Jan. 24, 2018. <https://sites.duke.edu/lawfire/2018/01/24/the-bloody-nose-strategy-debate-why-its-more-complicated-than-some-think/>

¹⁵¹ G. Seib, “Amid Signs of a Thaw in North Korea, Tensions Bubble Up”, *The Washington Post*, Jan. 9, 2018. <https://www.wsj.com/articles/amid-signs-of-a-thaw-in-north-korea-tensions-bubble-up-1515427541>

to have support from Japan, as a U.S. limited strike operation would put Japanese civilians at risk from North Korea's short-range ballistic missile arsenal.¹⁵²

This is why aligning Japanese and U.S. interpretations of the Laws of War are important. By having diverging perspectives on what self-defense is and when Article 5 can be activated, the U.S. and Japan will face many challenges developing an operational planning doctrine for managing Chinese gray zone activities, which rely on exploiting uncertainty in the legal realm, and will also fail to be able to coordinate on responses to a North Korean crisis.

One possible solution is for the U.S. to articulate its defense commitments to Japan as in-line with the Caroline Doctrine, as opposed to the current doctrine of preventative self-defense. As mentioned before, Japan's constitution does allow for anticipatory self-defense in certain contingencies, such as if it detects missiles falling towards Japan.¹⁵³ Preemptive strikes however, which are considered permissible by the U.S. and under Article 51 of the United Nations Charter, are not allowed by the Japanese constitution.¹⁵⁴

By curtailing its interpretation of armed attack to a shorter timeframe of imminence, the U.S. can bring its interpretation of Article 5 in-line with Japan, synchronizing legal doctrines. Furthermore, the U.S. would establish that it can only authorize the use of collective self-defense under the U.S.-Japan MDT when Japan exercises its right of individual self-defense, bringing it in-line with the precedent set by Nicaragua. Adopting this interpretation would significantly alter some of the core dynamics of the U.S.-Japan Mutual Defense Treaty. The next chapter will discuss these dynamics in depth and their implications for the future of the U.S.-Japan alliance.

¹⁵² N. Blanchette, "All the Bombs in the World Won't Solve the North Korea Crisis (It Will Only Make It Worse)", *The National Interest*, Nov. 15, 2017. <https://nationalinterest.org/feature/nicholas-blanchette-benjamin-rimland-23214>

¹⁵³ M. Kurosaki, "The 'Bloody Nose' Strategy, Self-Defense and International Law: A View from Japan", *Lawfare*, Feb. 15, 2018. <https://www.lawfareblog.com/bloody-nose-strategy-self-defense-and-international-law-view-japan>

¹⁵⁴ Japan Diet. *The 145th House of Representatives Budget Committee*. February 16, 1999 <https://kokkai.ndl.go.jp/#/detailPDF?minId=114505261X01419990216>

CHAPTER 9: IMPLICATIONS OF MODIFYING THE ALLIANCE

Just as Prime Minister Abe's reinterpretation of Japan's constitution to allow Japan to participate in military and freedom of navigation operations marked a significant evolution in the U.S.-Japan alliance, restricting the conditions for the U.S. to activate Article 5 of the alliance would dramatically alter the security framework in East Asia. While the U.S. preventative war doctrine has faced its fair share of criticism, it has also served a unique purpose. By maintaining a broad interpretation of when it can use force, the U.S. has been able to conduct military operations beneficial for its security that states with a stricter interpretation on the use of force could not conduct. In the case of Japan, this has been the basis for the sword and shield framework. With the U.S. having the flexibility to conduct offensive military operations across geographical theaters, Japan has been able to concentrate its military planning on defensive operations.

By limiting U.S. defense of Japan to instances where Japan defends itself, Japan may take it upon itself to develop military capabilities as a substitute to the capabilities U.S. military operations previously provided. In other words, Japan may end up wielding the sword, as the U.S. doctrine of anticipatory defense from the Caroline Doctrine would grant Japan more flexibility in conducting military operations. Historically, changes in U.S. alliance treaties have been a precursor to states amending the security components of their constitution, and the U.S. narrowing the instances in which it can activate Article 5 could be the necessary catalyst for Japan to revise its own constitution to expand its military's role.¹⁵⁵ Not only would this be in-line with the 2015 U.S.-Japan Defense guidelines, but it would also give Japan the legal authorization

¹⁵⁵ M. Rapp-Hooper, "Mira Rapp-Hooper on 'Shields of the Republic'", *Lawfare*, June 19th, 2020. <https://www.lawfareblog.com/lawfare-podcast-mira-rapp-hooper-shields-republic>

to defend its claims in Okinotori without relying on the MDT, thereby allowing the U.S. to recuse itself from the dispute.

Currently Japan's doctrine of anticipatory self-defense is far closer on the spectrum to Senshu Boei than it is to preemptive self-defense. Outside of waiting for a direct attack to occur, Japan's options for initiating self-defense are limited to instances of "falling objects", or when a missile is already incoming towards Japanese territory.¹⁵⁶ By cooperating with the U.S. to establish conditions for Article 5 similar to that of the Caroline Doctrine, Japan could use the subsequent restriction of U.S. preventative and preemptive military operations as a political justification to modify, reinterpret, or develop a separate legal doctrine for the Japanese constitution to allow for self-defense in instances to "remove the source of the attack within the territory of adversaries before any actual damage is caused".¹⁵⁷

One subject of controversy within Japanese defense planners has been the distinction between a threat in the initiation phase, one that would be allowed under Senshu Boei, versus an imminent threat, as articulated by the Caroline Doctrine. The Diet has previously held that in order for a threat to be considered imminent, it must demonstrate "substantial grounds for its probability" of intent that an armed attack is about to occur.¹⁵⁸ Under this interpretation, until adversarial missiles are seconds away from being launched, Japan may not consider the preparations an armed attack. Concern about this interpretation was echoed following the

¹⁵⁶ M. Kurosaki, "The Dynamics of Japan's "Armed Attack Initiation" Doctrine and Anticipatory Self-Defense", *Lawfare*, Sept. 1, 2020. <https://www.lawfareblog.com/dynamics-japans-armed-attack-initiation-doctrine-and-anticipatory-self-defense>

¹⁵⁷ M. Kurosaki, "The Dynamics of Japan's "Armed Attack Initiation" Doctrine and Anticipatory Self-Defense", *Lawfare*, Sept. 1, 2020. <https://www.lawfareblog.com/dynamics-japans-armed-attack-initiation-doctrine-and-anticipatory-self-defense>

¹⁵⁸ Japan Diet. *The 156th House of Councilors Special Committee on Dealing with Armed Attack Situations No. 8*. May 28, 2003. <https://kokkai.ndl.go.jp/#/detail?minId=115615053X00820030528&spkNum=205¤t=1>

cancellation of Japanese deployment of AEGIS Ashore, when former defense minister Nakatani stated:

We cannot take for granted that the United States will retaliate if we are attacked. There is a need for us to enhance deterrence by developing our own retaliatory capability¹⁵⁹

By synchronizing U.S.-Japan legal standards to be in accordance with the Caroline Doctrine, this would give Japan significantly more leverage to protect itself. For example, in 2003, there was much confusion over comments made by Japanese Defense Minister Shigeru Ishiba over whether North Korea claiming it was about to turn Japan into a sea of fire and then begin loading its missiles would constitute a threat in the initiation phase, or if the more traditional definition of “falling rocks” would take precedent.¹⁶⁰

Ishiba’s question has only become more relevant as missile proliferation has spread throughout Asia, drastically altering the traditional burden-sharing environment. Political sentiment in Japan in favor of taking on a more offensive military role has been increasing linearly with this proliferation, reflected in a 2018 poll that found 85% of the Japanese public believes U.S. support to enhance the JSDF is best way to defend against China.¹⁶¹ While opinion is divided about what specific enhancements should take place, support for a broader role for the JSDF can continued to be seen in the Diet, with proposals to develop greater capabilities to neutralize ballistic missile threats as well as cyber warfare operations.¹⁶²

¹⁵⁹ E. Mori, “Japan’s missile defense is like playing soccer with just the keeper.” Interview with Gen Nakatani, Former Defense Minister”, *Nikkei*, August 24th, 2020.
<https://business.nikkei.com/atcl/gen/19/00179/082100007/?P=4>

¹⁶⁰ Japan Diet. *The 156th House of Representatives Budget Committee No. 4* January 24, 2003.
<https://kokkai.ndl.go.jp/#/detail?minId=115605261X00420030124&spkNum=50¤t=-1>

¹⁶¹ Japan Cabinet Office. *Japan’s relations with other countries*. 2018.

¹⁶² C. Tsuneoka, “Japan Plans Its Own Missiles Able to Hit North Korea”, *The Wall Street Journal*, Dec. 9, 2020.
<https://www.wsj.com/articles/japan-plans-its-own-missiles-able-to-hit-north-korea->

Despite this support for taking on a broader role, Japan has so far failed to obtain the legal authorization for such capabilities due to the Senshu Boei doctrine. This is why Abe fought so hard for constitutional revisionism, even though his initial reinterpretation of the constitution was considered a political success.¹⁶³ Despite Abe's repeated efforts to allow for such capabilities under the constitution, the broad defensive capabilities that the U.S. provided obviated the need for such revision to occur. If the U.S. were to alter the alliance framework by minimizing its role in activating Article 5, Japan could have the political leverage to finally push the Diet towards constitutional revisionism. The next chapter will discuss the costs and benefits of Japan revising its Constitution and what the implications are for U.S. defense posture.

11607510528#:~:text=TOKYO%E2%80%94Japan%20plans%20to%20develop,if%20it%20anticipates%20an%20at tack.

¹⁶³ A. Shinzo, "Asia's Democratic Security Diamond", *Project Syndicate*, Dec. 27, 2012. <http://www.project-syndicate.org/commentary/a-strategic-alliancefor-japan-and-india-by-shinzo-abe>

CHAPTER 10: COSTS AND BENEFITS OF A JAPANESE REARM

Benefits of a Japanese Rearm

The main benefit of Japan being able to amend its constitution to allow its military to take on new roles and missions is that it would be able to fulfil its national security needs in a manner that an exclusively defense oriented posture would not allow. By changing the sword-and-shield framework to one that would authorize military capabilities such as counterforce, Japan can increase the cost efficiency of its deterrent posture to make it more effective in deterring threats from both North Korea and China.

In former Prime Minister Abe's New Year's press conference in 2018, he highlighted how North Korea's nuclear and missile provocations presented Japan with the "toughest" security environment Japan had faced since the Second World War.¹⁶⁴ North Korea's increasingly larger and upgraded missile arsenal has been one of the core drivers of Japan's defense reforms, and the Japanese leadership is aware that their current doctrine is insufficient at deterring the threat.

Additionally, China's military modernization has been forcing a shift in Japan's defense policy. In Japan's Ministry of Defense's White Paper in 2019, it articulated the need for a "multi-domain defense force", that was not only capable of integrating operations in the traditional land, sea, and air domains, but also addressing new domains such as cyber and space.¹⁶⁵ The report specifically mentions the proliferation of North Korea's ballistic and cruise missile arsenal, as

¹⁶⁴ "Prime Minister Abe New Year Press Conference", News release, January 4th, 2018
https://www.kantei.go.jp/jp/98_abe/statement/2018/0104kaiken.html

¹⁶⁵ Japan Ministry of Defense. *The Defense of Japan*. White Paper, 2019,
https://www.mod.go.jp/en/publ/w_paper/wp2021/DOJ2021_Digest_EN.pdf

well as China's development of hypersonic missiles, as the impetus behind Japan needing to adopt new capabilities in the changing security environment.

Another primary driver for Japan's evolution in defense policy is that its Senuo Boei defense only policy is seen as becoming increasingly unsustainable from both a military and an economic perspective. This skepticism can be seen in Japan's decision to cancel the deployment of the AEGIS Ashore missile defense systems that would have been able to cover the majority of Japan's territory.¹⁶⁶ Defense Minister Taro Kono cited both technological and economic reasons for cancelling the system and has shifted the national conversation to discuss new methods to deter missile proliferation. While Japan did begin construction on two new AEGIS warships, the mobile, sea-based counterpart to AEGIS Ashore, the cancellation demonstrates Japan's lack of interest in exclusively using missile defense as its core deterrent.¹⁶⁷

It is important to note that Japan's cost concerns about the AEGIS Ashore system are not unfounded. Being a defender is expensive, especially when it is compared to the low cost of producing short-range ballistic missiles. Both North Korea and Iran have demonstrated that it is not a difficult task to mass produce ballistic missiles even with an economy hampered by sanctions. The SM3 Block 2A, the new interceptor used by AEGIS missile defense systems, is significantly advanced in terms of capabilities.¹⁶⁸ It is also extremely expensive at nearly \$50 million per interceptor, with the initial construction cost for an AEGIS Ashore system that launches the SM3 estimated at around \$2 billion.¹⁶⁹

¹⁶⁶ M. Yeo, "Japan suspends Aegis Ashore deployment, pointing to cost and technical issues", *Defense News*, June 15, 2020. <https://www.defensenews.com/global/asia-pacific/2020/06/15/japan-suspends-aegis-ashore-deployment-pointing-to-cost-and-technical-issues/>

¹⁶⁷ Y. Inaba, "Japan's New "Aegis Equipped Ships": What We Know So Far", *Naval News*, May 24, 2021. <https://www.navalnews.com/naval-news/2021/05/japans-new-aegis-equipped-ships-what-we-know-so-far/>

¹⁶⁸ "\$3.3 billion sale to Japan of 73 SM-3 ballistic missile interceptors approved", *Defense Post*, Aug. 28, 2019. <https://www.thedefensepost.com/2019/08/28/us-japan-sm-3-ballistic-missile-interceptors/>

¹⁶⁹ "SM-3 BMD, in from the Sea: EPAA & Aegis Ashore", *Defense Industry Daily*, Sept. 6, 2021. <https://www.defenseindustrydaily.com/sm-3-bmd-04986/>

Outside of the initial construction, Japan would also have to develop and deploy a range of additional military capabilities that are meant to compliment the AEGIS Ashore system. An integrated strike package capable of supporting AEGIS Ashore would have to include advanced dynamic intelligence gathering, surveillance and reconnaissance capabilities, multi-role fighters, precision-guided munitions, and escort jammers for electronic protection.¹⁷⁰

Yielding these capabilities would not be easy in a short timeframe and given North Korea and China's relentless investment in modernization, Japan may be left in a position where it is constantly playing an expensive game of catch-up to defend against its adversaries' new capabilities. This has led to concerns about a "strike gap" in Northeast Asia, where adversaries' advancements in quality and quantity of missiles gives them the ability to overmatch defensive capabilities. Given the rapidly expanding size of North Korea's ballistic missile arsenal, it is conceivable that in a short period of time North Korea could have a sufficient number of missiles to establish overmatch against Japan's limited missile defense.¹⁷¹ When it comes to China's missile arsenal, it is simply far too large for Japanese missile defense to have meaningful impact on preventing an attack, thus leaving almost the entirety of Japan's deterrent against China up to the U.S.

This is not an argument that missile defense is on the wrong end of the cost curve because it is more expensive than producing ballistic missiles. There is both intrinsic and economic value in protecting cities from an adversary's missiles. In the current political climate in Japan however, there is great concern about the economic cost of building missile defense.

¹⁷⁰ M. Murano, "The Future of Deterrence Strategy in Long-Term Strategic Competition", *Stimson Center*, March 2020. <https://www.stimson.org/wp-content/uploads/2020/03/KeyChallengesInJapansDefensePolicy-March2020-V3-web.pdf>

¹⁷¹ C. Sang-Hun, "North Korea's Arsenal Has Grown Rapidly. Here's What's in It.", *The New York Times*, October 1, 2021. <https://www.nytimes.com/article/north-korea-arsenal-nukes.html>

Additionally, the Japanese government faced severe backlash from local communities about the safety of having missile defense systems in their communities.¹⁷² Regardless of the strategic value of missile defense, the Japanese political climate has demonstrated that it is reluctant to invest in the AEGIS Ashore capability.

A Japanese exclusively defensive policy might also pose consequences for U.S. defense policy in the region, which could be especially detrimental now that the U.S. is focused not only on deterring North Korea but also competing with China.¹⁷³ Thomas Mahnken of Stanford University argues that a core component of a “competitive strategy” is to encourage competitors to waste resources in areas that they do not have a comparative advantage.¹⁷⁴ In this case, joint U.S.-Japan BMD investment costs both states exorbitant amounts of money while at the same time adversaries invest in missile defense countermeasures for a far lower cost.

This leaves Japan in a position where the law is determining the operational capacity of its military instead of the threat posed by its current security environment. The Sword-and-Shield framework has allowed Japan for decades to assume a solely defensive role, and for a long-time that posture was beneficial to both nation’s security objectives. By minimizing the conditions under which the U.S. can activate Article 5 of the U.S.-Japan MDT, Japan would be left with the political capital needed to modify its own armed-attack doctrine to allow for new weapons capabilities that could drastically improve its deterrent posture.

Japan has already demonstrated that it has the technical capacity for such a shift with its investment to increase the range of anti-ship missiles such as the Type 12, making it capable of

¹⁷² F. Rose, “Not in my backyard: Land-based missiles, democratic states, and Asia’s conventional military balance”, *Brookings*, Sept. 10, 2020. <https://www.brookings.edu/blog/order-from-chaos/2020/09/10/not-in-my-backyard-land-based-missiles-democratic-states-and-asias-conventional-military-balance/>

¹⁷³ U.S. Department of Defense. Summary of the 2018 National Defense Strategy, January 19, 2018, p. 1.

¹⁷⁴ T. Mahnken, *Competitive Strategies for the 21st Century*. (Stanford University Press: 2012) p. 71.

reaching enemy territory.¹⁷⁵ However, as long as Japan's constitution prohibits this type of offensive capability, it will lack the legal authority to deploy them. Additionally, while the Type-12 demonstrates the technical viability of long-range strike for Japan, it is an anti-ship missile, not meant for long-range land targets, and only has a range of 150-200 km, which is much shorter than China's long-range missiles.¹⁷⁶

Establishing the legal authorization for a long-range missile strike capability could help Japan to deter the increasing threat from Chinese and North Korean missiles. A long-range strike capability for Japan would make it more capable of responding to adversarial threats by communicating that it does have the ability to impose costs, or establish deterrence by punishment, by targeting the mainland of these adversaries. It could also serve to establish an enhanced capability to respond in gray zone operations, as China would be far less likely to make a move against Okinotori or the Senkaku if it had to factor in that Japan may launch long-range missiles as one of its response options.

This is not to argue that Japan should give up on missile defense. Japan's current defensive systems serve a great deal of value, in particular in defending against a small, limited attack from North Korea. However, deterrence is about forcing the adversary to take several variables into consideration when preparing to conduct an offensive strike. If Japan only has a deterrence-by-denial posture, then the number of variables for China and North Korea to take into consideration when planning a strike is more limited than if they also have to contemplate Japanese counterforce capabilities.

¹⁷⁵ Y. Inaba, "Japan To Greatly Extend Range Of Type 12 Anti-Ship Missiles, Modify It For F-15J", Naval News, Jan 21, 2021. <https://www.navalnews.com/naval-news/2021/01/japan-to-greatly-extend-range-of-type-12-anti-ship-missiles-modify-it-for-f-15j/>

¹⁷⁶ "Type 12 Coastal defense missile system", *Military Today*, n.d. http://www.military-today.com/missiles/type_12.htm

While the U.S. nuclear umbrella is another factor for adversaries to take into consideration, a nuclear response to a limited conflict in Northeast Asia would be widely disproportionate. If the U.S. were to intervene conventionally, the massive increases in the size of China's navy in combination with its A2/AD capabilities may be able to overpower the U.S.'s offensive regional strike capabilities.¹⁷⁷ While the Pacific Deterrence Initiative (PDI) has strived to make improvements in this regard, U.S. adherence to the INF treaty for the past several decades has put it at a severe disadvantage in this regard.¹⁷⁸ Some in Japan are also concerned that despite the Biden administration's positive sentiment towards U.S. alliances, the U.S. will be prioritizing economic recovery post-Covid-19 and that it will have limited means to assist Japan in military disputes, especially if amending trade relations with China is a core part of that economic recovery.¹⁷⁹

By adding an offensive capability into Japan's repertoire, it would greatly complicate the deterrence calculations that China or North Korea would have to make before engaging in offensive military or aggressive gray zone operations. Shortened warning times and potential costs to military or civilian targets would add a vast new dimension of risk to an adversary planning to strike. Developing a long-range offensive strike capability would prevent Japan from putting all of its eggs in one basket with deterrence by denial, and instead utilize its missile defense, civil defense, counterforce, left of launch, and offensive military capabilities to create a concept of fully integrated defense that would give it more options for how to deter or engage in a potentially escalatory conflict.¹⁸⁰

¹⁷⁷ M. Murano, "The Modality of Japan's Long-Range Strike Options", *Texas National Security Review*, October 1, 2020. <https://tnsr.org/roundtable/policy-roundtable-the-future-of-japanese-security-and-defense/#essay4>

¹⁷⁸ S. Takahashi, "America and Japan in a Post-INF World", *War on the Rocks*, March 8, 2019. <https://warontherocks.com/2019/03/america-and-japan-in-a-post-inf-world/>

¹⁷⁹ J. Kobar, "Japan greenlights missile shield as rivals sharpen spears", *Nikkei*, Dec. 19, 2020. <https://asia.nikkei.com/Politics/Japan-greenlights-missile-shield-as-rivals-sharpen-spears>

¹⁸⁰ M. Murano, "The Modality of Japan's Long-Range Strike Options"

In addition to enhancing its defense capabilities, possessing long-range strike options could also benefit Japanese diplomacy when it comes to gray zone disputes. China currently has little incentive to negotiate with Japan over the Senkaku or Okinotori because it believes it has the advantage in terms of relative military capability.¹⁸¹ With China ignoring The Hague ruling that its operations in the South China Sea go against international law, there is little room for optimism that any form of appeal to liberal norms will be sufficient to bring China to the negotiating table regarding its island disputes. By tipping the balance of power in Asia towards Japan, even if it is far from establishing parity with China, Japan would have more of an opportunity to establish leverage with China than in the status quo where China holds all of the cards.

While the U.S. has historically played the role of providing offensive strike operations, the 2015 U.S.-Japan defense guidelines and Abe's re-interpretation of the constitution recognize that the changing security environment has increasingly blurred the lines between offense and defense.¹⁸² Due to the rapid ability of enemy missiles to target Japan, possessing the ability to destroy these missile sites before they can be launched would not be a form of preventative defense, but would rather expand anticipatory defense to better address threats in the 21st century. "Active defense" or "tactically offensive" operations for the purpose of strategic defense could then be incorporated into Japan's military planning while retaining the core aspects of *Senshu Boei*.¹⁸³

¹⁸¹ J. Pickar, "Japan's defensive constitution : nuclear weapons as a better alternative than expanding collective self-defense", *University of Chicago Law School Chicago Unbound*, 2016.
https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1025&context=international_immersion_program_papers

¹⁸² Japan Ministry of Foreign Affairs. The Guidelines for Japan-U.S. Defense Cooperation.

¹⁸³ M. Murano, "The Modality of Japan's Long-Range Strike Options"

In order for a long-range strike deterrent to work, great attention will have to be applied to the development of the operational doctrine to assure both allies and adversaries that Japan is not shifting to a doctrine of preemption. That is why an adjustment in the U.S.-Japan MDT to limit the scope of the U.S. ability to activate Article 5 is necessary. Absent a broader shift in the U.S.-Japan alliance, the perception of Japan developing a long-range strike doctrine will be that it is disregarding its pacifist principles and could send the perception of a return of an imperial Japan. By modifying the U.S. role in the alliance, Japan can shape its long-range strike doctrine to be developed as an expanded form of defense, used only as a response to imminent threats to Japanese security.

Counterarguments to a Japanese long-range strike posture will be discussed more in the next chapter, however some of their implications will be discussed here. A strong argument against Japanese long-range strike capabilities is that it will create a security dilemma in East Asia, incentivizing China and North Korea to accelerate their own missile capabilities and result in a regional arms race.¹⁸⁴ The security dilemma logic however rests on the assumption that country A's intentions are a direct byproduct of country B. This implies almost a sense of cultural narcissism, in which China has no agency regarding its national security policy, and instead fluctuates accordingly with the actions of states like the U.S. and Japan.

At the same time, Japan and Chinese economic relations are “flourishing” as trade remains high between the two states.¹⁸⁵ On the diplomatic front, President Xi was about to pay a visit to Japan until COVID-19 locked down travel.¹⁸⁶ Going back even further, from the 1990s

¹⁸⁴ R. Jervis, *Perception and Misperception in International Politics*. (Princeton University Press, 1978) p. 251.

¹⁸⁵ A. Singn, “Japan-China economic ties flourishing”, *The Sunday Guardian*, Jan. 2, 2021.
<https://www.sundayguardianlive.com/news/japan-china-economic-ties-flourishing>

¹⁸⁶ “Xi visit on hold, probably until 2022 when key anniversary held”, *The Asahi Shimbun*, Nov. 27, 2020.
<https://www.asahi.com/ajw/articles/13968011>

until 2010 when China began building up its military capability, both Japan and the U.S. maintained relatively flat military budgets, and even when the U.S. defense budget increased as a result of the War on Terror, the majority of those capabilities were not being targeted at China.¹⁸⁷ What this history implies is that China will continue its military buildup regardless of the economic, diplomatic, or military relations it has with the U.S. or Japan. China has demonstrated that it has revisionist intentions to establish itself as the Asian hegemon, and that involves rewriting territorial and maritime boundaries. Arguments that China is a defensive realist and will reciprocate U.S. actions to disengage have been disproven by historical trends.

That is not to say however that an expanded Japanese deterrent will not come without risks. The next section will discuss if Japan should be the actor to enhance strategic stability in Asia, or if that mission is better left to the U.S.

Costs of a Japanese Rearm

Modifying the U.S.-Japan alliance to create a political shift towards legal authorization for Japanese long-range strike capabilities may serve to enhance its defense posture in Northeast Asia. There may also be consequences to a restructuring of the security order of this scale, and those need to be taken into consideration when formulating long-term visions for the alliance. Perhaps the largest concern would be how such a shift would affect U.S. defense policy, as the current balance of power has long been tied to U.S. military predominance.

Despite the rise of China and pronouncements about the end of U.S. hegemony, the U.S. still retains a strong deterrent foundation in East Asia, supplemented by its forward deployed

¹⁸⁷ Japan Ministry of Defense. Defense Programs and Budget of Japan. *Overview of FY2020 Budget Request*. Dec. 2019. https://www.mod.go.jp/e/d_act/d_budget/pdf/191112c.pdf

presence, advanced technological capabilities, and vast alliance network. Japanese expansion of military capabilities could tip the delicate balance of power the U.S. has established, as well as signal the return of an imperial Japan.

As discussed in the previous section, revisions to the U.S.-Japan alliance that have allowed for broader interpretations of self-defense have historically led to broader expansion of Article 9 of the Japanese constitution that “renounce[s] war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”¹⁸⁸ In 1992, Japan passed the Peace Keeping Operation Law, which permitted Self-Defense Forces (SDF) personnel to UN peacekeeping operations, but prevented them from initiating force.¹⁸⁹ In 2003, during the War on Terror, the Diet authorized SDF forces to be deployed alongside allied partners, but did not allow deployment in certain areas that were considered hostile.¹⁹⁰ Prime Minister Abe’s reinterpretation of Article 9 in 2013 allowed Japan to expand instances of self-defense to include fighting alongside allies and freedom of navigation operations, but not initiating hostilities themselves.¹⁹¹ What can be seen from this historical pattern is that expansions of the role of the SDF occur as a result of the evolving security environment, and while this may be necessary, it is subsequently weakening the strength of Article 9. Therefore even if initial deployment of long-range missiles is intended purely for defensive purposes, there’s no guarantee that the way legal

¹⁸⁸ The Japanese Prime Minister and His Cabinet. *The Constitution of Japan*, November 3rd, 1946..

¹⁸⁹ Japan Ministry of Foreign Affairs. *Japan's Contribution to UN Peacekeeping Operations*, 2005. <https://www.mofa.go.jp/policy/un/pko/pamph2005.html>

¹⁹⁰ K. Ishizuka, “The Crisis Management Capability of Japan's Self Defense Forces for UN Peacekeeping, Counter-Terrorism, and Disaster Relief”, *Japanese Journal of Political Science*, vol. 14, no. 2 (2004) pp. 201-222 <https://www.cambridge.org/core/journals/japanese-journal-of-political-science/article/abs/crisis-management-capability-of-japans-self-defense-forces-for-un-peacekeeping-counterterrorism-and-disaster-relief/1649B48763CCCE4938F81BEB3E9725DD>

¹⁹¹ J. Ritcher, “Japan’s “Reinterpretation” of Article 9: A Pyrrhic Victory for American Foreign Policy?”, *Iowa L. Rev.*, vol. 101, no. 3 (2016) <https://ilr.law.uiowa.edu/print/volume-101-issue-3/japans-reinterpretation-of-article-9-a-pyrrhic-victory-for-american-foreign-policy/>

authorization occurs would broaden their potential uses from one of strictly anticipatory to one of preemptive, or preventative self-defense.

The value of a strong and limited Article 9 is that it has assured allies and adversaries against the notion of a return to an imperial Japan. Historical animosities continue to be a defining feature of the Asian security architecture, and the Japan-Chinese relationship is no exception. China has already been vocal about its opposition to Japan's expanded role in missile defense, declaring that it "could trigger an arms race", and there is little reason to doubt their opposition would be any less towards the development of offensive capabilities.¹⁹²

Given the vast array of potential threats looming in East Asia, there is also a strong argument for a general presumption towards the status quo and not altering security agreements that could lead to unforeseen consequences. "Black swans", low probability but high-impact events, can happen at any time, but creating a drastic alteration in a dynamic and delicately balanced security environment would increase the risk of one occurring.¹⁹³ North Korea's ballistic missiles, as well as its chemical and biological arsenal, missile, cyber, and space threats from China, territorial disputes involving Taiwan and Russia, all of these scenarios have been deterred from escalating by the presence of U.S. military power.¹⁹⁴ There are those who argue that the benefit of a Japanese strike capability complicating adversarial deterrence doctrines could also make it more dangerous.¹⁹⁵ By adding another state in East Asia with ballistic missile capabilities, the balance of power that has prevented escalation in the past could be destabilized,

¹⁹² D. Wenlong, "Japan's plan for building anti-missile ships would undermine regional peace", September 8, 2020. <https://www.globaltimes.cn/content/1200197.shtml>

¹⁹³ "Big Bets and Black Swans: Foreign Policy Challenges for President Obama's Second Term", *Brookings*, Jan. 17, 2013. <https://www.brookings.edu/interactives/big-bets-and-black-swans-foreign-policy-challenges-for-president-obamas-second-term-2/>

¹⁹⁴ D. Sterling, "Governing Japan: The Perception, Influence and Theoretical Interpretation of Article 9 of the Japanese Constitution and What It Means for Its Security Policy in the 21st Century, If Revised", *Open Journal of Social Sciences*, vol.8, no.11. (2020) <https://www.scirp.org/journal/paperinformation.aspx?paperid=104414>

¹⁹⁵ Tønnesson, Stein. *Identity, Trust, and Reconciliation in East Asia*. (Palgrave MacMillan, 2018).

especially if a black swan event were to occur. This thinking is flawed according to those that favor the value and importance of defensive measures and will be addressed more in the next chapter.

Another consequence of broadening Japan's use of force doctrine is that it would limit the amount of influence the U.S. has over Japanese military strategy. With the U.S. being the provider of Japanese security, Japan heavily consults with the U.S. on nearly all foreign policy issues to ensure the two allies are operating in sync. If Japan wields the sword in the sword-and-shield framework, it raises the risk of an alliance moral hazard. Japan could feel emboldened by the U.S. nuclear umbrella and its own new capabilities and act more reckless, raising the risks of entrapment in a conflict with North Korea or China.¹⁹⁶

A more active Japan may also upset the carefully calculated capability balance the U.S. has established with the sword-and-shield framework. While many have advocated for Japan having a greater role in providing for its own security, this view downplays the important role Japan has played as the shield. Japanese military capabilities are not simply isolated defensive mechanisms, but a compliment to U.S. capabilities in the region. For example, while the U.S. may be the provider of more visible capabilities such as carrier strike groups, expeditionary strike, and special warfare forces, Japan has been essential in providing reconnaissance, mine-sweeping, and submarine forces, all of which are essential for the joint warfighting doctrine the two have developed over the years.¹⁹⁷ As discussed above, Japan does face fiscal constraints

¹⁹⁶ L. Fatton, "New Japanese Strike Weapons Could Spark An Asian Arms Race", *The National Interest*, Sept. 19, 2020. <https://nationalinterest.org/blog/buzz/new-japanese-strike-weapons-could-spark-asian-arms-race-169307>

¹⁹⁷ J. Hartman, "The United States and Japan Still Benefit From Complimentary Maritime Capabilities", *War on the Rocks*, March 9, 2021. <https://warontherocks.com/2021/03/the-united-states-and-japan-still-benefit-from-complementary-maritime-capabilities/>

regarding its military, and investment in a strike capability may take away resources from core defensive capabilities that are required for both its own and U.S. warfighting capacity.

Difficulties also arise over the prospects of success for a Japanese strike capability. Just as establishing an effective integrated missile defense posture would require a long-learning curve for Japan to familiarize itself with the various technologies and new missions, the same is true for adapting a strike posture. Japan will have to work to develop new command and control, deploy additional assets, and train the SDF to integrate new support and maintenance systems.¹⁹⁸ Furthermore, left-of-launch techniques have been difficult to perfect even in the U.S., so it will be a challenge for Japan to develop the capability and credibility in a fast time-frame.¹⁹⁹ This also raises important questions about the reactions of China or North Korea in this interim period. If China and Russia perceive an imperialist Japan as an existential threat to their security, they might believe it is necessary to engage in military action against Japan before Japan can fully operationalize a long-range strike doctrine.

Finally, there is the nuclear question that has been of constant debate in Japan. The Three Non-Nuclear principles, articulated by former Prime Minister Eisaku Sato in 1967 have long governed Japan's policy towards nuclear weapons, in that they are not allowed to possess, produce, or permit their usage.²⁰⁰ However, if long-range strike options are considered as self-defense under Article 9, it is conceivable that Japanese policymakers could look at nuclear weapons in the same way.

¹⁹⁸ Y. Nishi, "The argument with "enemy base attack ability" heard by Takeshi Iwaya, former Defense Minister, is a leap of logic.", *Diamond*, Aug. 20, 2020. <https://diamond.jp/articles/-/246267>

¹⁹⁹ C. Wallace, "The Future of Japan's Defense Is More Complicated than it Looks", *The Tokyo Review*, Sept. 14, 2020. <https://www.tokyoreview.net/2020/09/the-future-of-japans-defense-is-more-complicated-than-it-looks/>

²⁰⁰ Japan Ministry of Foreign Affairs. Three Non-Nuclear Principles, Dec. 11, 1967. <https://www.mofa.go.jp/policy/un/disarmament/nnp/>

Such a scenario would have severe repercussions for regional stability. China and North Korea would have a strong incentive to use military force to prevent any attempt by Japan to develop the ultimate deterrent, risking conflict that could draw in the U.S.²⁰¹ Gary Bass, professor of politics and international affairs at Princeton University, warns that in trying to prevent a high probability evil from occurring, a lower probability but higher magnitude evil can sometimes occur.²⁰² In this case, a Japanese long-range strike capability may serve Japan's interests in the short-term, but could also cause worse consequences in the long-run. In addition to short-term intervention, Japan proliferation of nuclear, or even greater conventional capabilities may inspire a cascade of proliferation across the region, inviting South Korea, Taiwan, Australia, and other states to develop similar capabilities.²⁰³ Each one of these instances would demand a fundamental revisal to deterrence calculations.

Developing a long-range strike ability in Japan could entail risks, however, given the current threat environment in the Indo-Pacific, action must be taken to assure the security of U.S. allies. While a Japanese long-range strike capability may pose some risk to regional stability, China and North Korea have already demonstrated their intentions of developing destabilizing capabilities including but not limited to hypersonic glide vehicles, road mobile missile launchers, multiple independent re-entry vehicles (MIRVs). The U.S. and Japan must work to strengthen their defense posture to defend against these new capabilities, and a Japanese long-range strike option would go a long way in accomplishing this. The next chapter provides a set of recommendations for how the U.S. and Japan can respond to the missile threat posed by China and North Korea, including the development of a long-range strike capability in Japan, while

²⁰¹ Z. Beauchamp, "Trump's comments on Japanese nukes are worrisome — even by Trump standards", *Vox*, March 31, 2016. <https://www.vox.com/2016/3/31/11339040/trump-nukes-japan-south-korea>

²⁰² G. Bass, "Just and Unjust Proliferation", *Ethics*, vol. 130, no. 3, (2020) pp. 358-359

²⁰³ A. Debs, "Cascading Chaos in Nuclear Northeast Asia", *The Washington Quarterly*, vol. 41, no. 1 (2018) p. 110.

simultaneously addressing concerns about the return of Japanese imperialism. It also provides recommendations for how the U.S. and Japan can respond to alliance vulnerabilities in the gray zone by updating the alliance to account for the 21st-century security environment.

CHAPTER 11: RECOMMENDATIONS

This paper thesis has isolated two major problem areas in the Asian security environment that may pose risks to U.S. national security. The first is how the U.S. and Japan should update their military doctrines to respond to a rapidly evolving security environment, while simultaneously keeping those doctrines in-line with international laws and norms. The second problem area is the risk posed by missile proliferation in Asia, and how the U.S. and Japan should respond.

Policy Changes

The U.S. and Japan should modify the U.S.-Japan Mutual Defense Treaty (MDT) to be in-line with the Caroline Doctrine so that Article 5 can only be activated in the event that Japan requests security assistance from the U.S. In doing so, the U.S. would not be able to activate Article 5 under its broader interpretation of self-defense. A request for assistance by Japan would still be limited by the Senshu Boei doctrine. Therefore under this framework, preventative self-defense would still not be allowed by the Japanese government.

Historically, changes in the alliance structure have been followed by Japan updating the interpretation of its constitution and the role for the Japanese Self-Defense Forces (SDF). By modifying the U.S. role as the sword in the sword-and-shield alliance, Japan can then update its role for the SDF to take on a broader role in regional defense.

By modifying the MDT to limit the U.S. role, Japan can then have the legal authorization and political capital it needs to deploy counterforce long-range strike capabilities. The specifics of these deployments are discussed below under Military Recommendations. From a policy

perspective, this would entail Japan updating its interpretation of Senshu Boei to take on a larger role in providing for its national security, including scenarios of self-defense in which the SDF would be allowed to respond to an imminent threat by removing “the source of the attack within the territory of adversaries before any actual damage is caused”.²⁰⁴ This framework would resolve the “falling objects” problem where Japan has to wait for missiles to be heading towards its territory to respond and can instead target those missiles before they are launched with long-range counterstrike and left-of-launch capabilities.

This presents a critical opportunity for the U.S. and Japan to update their alliance framework to better address the threats of the 21st century. It also provides an opportunity for the U.S. and Japan to address the legal uncertainties that have developed as a result of the changing threat environment. By expanding Japan’s role in providing for its own national security, the U.S. and Japan can both strengthen their defense posture in the Indo-Pacific as well as clarify core issues of international law.

Additionally, the highest levels of government in the U.S. and Japan, the U.S. executive branch and the Japanese National Security Secretariat, should work to deepen exchanges and promote a shared understanding about the differences of each other’s self-defense doctrines. A core aspect of legal interoperability is recognizing that differences in legal doctrine will inevitably exist, and then creating strategies for scenarios where those inconsistencies may result in vulnerabilities, such as Chinese activities in the gray zone.²⁰⁵

²⁰⁴ M. Kurosaki, “The Dynamics of Japan’s “Armed Attack Initiation” Doctrine and Anticipatory Self-Defense”, *Lawfare*, Sept. 1, 2020. <https://www.lawfareblog.com/dynamics-japans-armed-attack-initiation-doctrine-and-anticipatory-self-defense>

²⁰⁵ Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions" p. 21.

The U.S. and Japan should also work to assemble a Japanese Law of War Manual.²⁰⁶

While Japan is a signatory to the Geneva Convention and therefore agreed to the Law of Land Warfare, there is not a reference point for how Japan interprets these laws. This is not to say the U.S. should seek to perfectly synchronize its Law of Warfare doctrine with each of its allies or that Japan should make its operational doctrine just like that of the U.S. Rather the U.S. should work with Japan to develop a procedural framework for how Japan interprets the law regarding the introduction of forces into hostilities so that the two states. can identify doctrinal differences. This will allow the U.S. and Japan to work together to adjust their operational planning for gray zone and defense policy to account for these differences.

Military Actions

The U.S. should work with Japan to develop a long-range strike option, specifically by developing a ballistic and cruise missile capability. In light of Japan's cancellation of the AEGIS Ashore program, a ballistic missile capability would serve to enhance its defense by providing Japan with a counterforce option against fixed Chinese ground targets. In the event of a Chinese fait accompli in the Senkaku, China would need to use its air power to prevent U.S. and Japanese forces from responding in both the air and sea domains.²⁰⁷ While targeting China's vast network of mobile missile launchers would prove difficult, targeting China's stationary capabilities that support their air force such as runways and radar facilities would be much more feasible.

Ground-launched cruise missiles (GLCMs) deployed in the Southwest Japanese islands would be

²⁰⁶ Takei, "Gray Zones and Vulnerability in the U.S.-Japan Alliance: Operational and Legal Dimensions" p. 21.

²⁰⁷ M. Murano, "The Japan-US Alliance in a Post-INF World: Building an Effective Deterrent in the Western Pacific", *The Hudson Institute*, Dec. 18, 2019. <https://www.hudson.org/research/15571-the-japan-us-alliance-in-a-post-inf-world-building-an-effective-deterrent-in-the-western-pacific>

able to target close-range assets such as radars and fuel facilities, and ballistic missiles would be used for long-range targets such as runways and command and control systems.²⁰⁸

These targets would be critical infrastructure for China if it were to wage an air campaign and degrading them would significantly weaken China's ability to sustain such operations. To deny China air superiority in the event of a fait accompli would be to deny a fundamental component of China's A2/AD strategy, the denial of the U.S. and Japan from entering the contested area. Developing a long-range strike capability would communicate to China that it has a small chance of holding onto any territory it has acquired during a fait accompli. A U.S. and Japanese rapid and immediate response to a Chinese fait accompli would significantly reduce the incentive China would have from taking such an action in the first place.

While using a long-range strike capability against China's mobile missile launchers would face significant challenges due to the sheer number of launchers China possesses, against North Korea it would be much more achievable. Compared to China's roughly 700 mobile launchers, North Korea is estimated to have 150-200 mobile launchers.²⁰⁹ Using ballistic and cruise missiles to target North Korean missile launchers would be far more practical against North Korea than it would with China, and if Japan were to coordinate with the U.S. and South Korea, it would be able to inflict significant damage against North Korea's launch capability.²¹⁰ Possessing this expeditionary capability would greatly increase Japan's ability to deter a North

²⁰⁸ J. Heim, "Missiles for Asia?: The Need for Operational Analysis of U.S. Theater Ballistic Missiles in the Pacific," *RAND*, 2016.

https://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR945/RAND_RR945.pdf

²⁰⁹ National Air and Space Intelligence Center. Defense Intelligence Ballistic Missile Analysis Committee. *Ballistic and Cruise Missile Threat*. June 30, 2017.

https://www.nasic.af.mil/Portals/19/images/Fact%20Sheet%20Images/2017%20Ballistic%20and%20Cruise%20Missile%20Threat_Final_small.pdf?ver=2017-07-21-083234-343

²¹⁰ M. Murano, "The Modality of Japan's Long-Range Strike Options4

Korean preemptive strike by communicating to Pyongyang that Japan is capable of inflicting substantial costs in the event it is attacked.

In terms of active defenses, the U.S. and Japan should continue to work together on missile defense, as that has historically been one of the strongest areas of cooperation in the alliance. Despite the cancellation of the AEGIS Ashore deployment, the U.S. and Japan still have several joint missile defense programs, including Japan's AEGIS destroyer fleet, seventeen Patriot PAC-3 batteries, information gathering for early warning, and research and development for new technologies.²¹¹ The U.S. should continue to work with Japan in these areas, as well as provide technical assistance for the two new AEGIS destroyers Japan chose to procure instead of the AEGIS Ashore system. As mentioned in Chapter 10, the continued missile proliferation by North Korea and China is making it increasingly difficult for Japan to rely exclusively on missile defense to provide for its national security. However, an effective missile defense architecture does force adversaries to take into consideration that any scenario involving the launching of missiles at Japanese territory may be significantly mitigated by defensive interceptors, contributing to an enhanced defense posture. In the event that deterrence was to fail, missile defense would also contribute to limiting the damage Japan would incur from a Chinese or North Korean missile attack.

Specifically, the U.S. should work with Japan on the development of integrated air and missile defense, which serves as a strong foundation for improving both technical and legal interoperability between the two allies.²¹² Policymakers can look to the guidance of the Joint

²¹¹ R. Hoff, "U.S.-Japan Missile Defense Cooperation: Increasing Security and Cutting Costs", *American Action Forum*, Dec. 2, 2015. <https://www.americanactionforum.org/research/u-s-japan-missile-defense-cooperation/>

²¹² J. Compton, "Japanese and US Forces work to Strengthen Regional Security Cooperation in the Pacific", *US-Indo-Pacific Command*, Feb. 2017 <https://www.pacom.mil/Media/News/News-Article-View/Article/1074323/japanese-and-us-forces-work-to-strengthen-regional-security-cooperation-in-the/>

Requirements Oversight Council (JROC) to provide unique insight on key capability gaps that if addressed will serve to improve interoperability and the effectiveness of existing systems with the U.S. and its allies.

In addition to active defenses, Japan and the U.S. should also work together on passive defenses. Specifically, the U.S. and Japan should harden their infrastructure in the region, including bases and logistical hubs. Doing so would not only force an adversary to use more missiles to destroy critical targets in the event of a military exchange, but it would also contribute to deterrence by denial by reducing the confidence an attacker would have in accomplishing a preemptive “knock-out” blow.²¹³ Along with hardening, the U.S. and Japan can work to build a more resilient basing network by dispersing critical logistics infrastructure throughout the region²¹⁴. This would force an attacker to have to account for more targets, as well as make it more difficult for the attacker to identify key vulnerabilities that if targeted could cause significant damage to U.S. and Japanese logistics support.

The U.S. should also continue to conduct military exercises with Japan to better understand how the dimensions of lawfare would play out in real time scenarios. While the U.S. and Japan already conduct several routine exercises to test current capabilities, more can be done to explore the various dimensions of the gray zone, such as transit operations in the East China Sea.²¹⁵ The U.S. already has a vast number of capabilities at its disposal, but by only conducting exercises in preparation for large-scale war, it finds itself vulnerable at the gray zone level in between war and peace.

²¹³ J. Stillion, “Base Hardening: Can America and Its Allies “Play Fort” against China?”, *The National Interest*, October 24, 2014. <https://nationalinterest.org/feature/base-hardening-can-america-its-allies-play-fort-against-11551>

²¹⁴ R. Joyce, “Access Denied? The Future of U.S. Basing in a Contested World”, *War on the Rocks*, Feb. 1, 2021. <https://warontherocks.com/2021/02/access-denied-the-future-of-u-s-basing-in-a-contested-world/>

²¹⁵ “Gaining Competitive Advantage in the Gray Zone”, RAND Corporation, 2019. https://www.rand.org/pubs/research_reports/RR2942.html

Diplomatic Actions

In the case of Okinotori, the U.S. should work with Japan and China to establish confidence building measures (CBMs) regarding maritime territorial issues. Specifically, the three countries should use current security hotlines to establish a notification mechanism for maritime law enforcement agencies for when they have vessels passing through contested waters, including those surrounding Okinotori, the Senkaku, or the South China Sea. Additionally, the three states should work to develop rules for maritime behavior for unplanned encounters of military vessels in contested waters.

It is important to note that there are significant limitations to the use of CBMs. Historically, the opaque nature of the Chinese government and reluctance to divulge strategic information has served as a roadblock to effective implementation of CBMs.²¹⁶ However, CBMs can serve as a steppingstone for broader diplomatic negotiations regarding maritime disputes. Even if China is initially reluctant to actively participate in CBMs, having a framework already in place would be beneficial if later down the road the Chinese government took a greater interest in resolving maritime disputes. Additionally, even if Chinese participation is initially low, in the event that a severe crisis was to occur in disputed waters, the Chinese may see the value in working with an established CBM mechanism if their intentions are to avoid greater escalation.

It is also important to note that CBMs will not completely resolve compliance issues with UNCLOS and international law. CBMs can however work to mitigate the consequences of international law disputes over contested territories. In the Okinotori and Senkaku disputes, one of the most pressing concerns is that the uncertainty over territorial recognition leads to

²¹⁶ T. Nagaiwa, "Japan-China Military Confidence Building Measures", *Tokyo-Cambridge Gazette*, Oct. 11, 2011. <https://cigs.canon/en/article/pdf/111020TCG-PEC-1110Oct-No7.pdf>

uncertainty over freedom of navigation for commercial and military vessels in the exclusive economic zones (EEZ) in the surrounding waters. By developing a CBM framework for proper rules of behavior for unplanned encounters in these waters, the U.S., Japan, China and other regional allies can work to establish a safer environment for commercial and law-enforcement vessels by reducing the uncertainty over what actions these vessels will take when entering disputed waters²¹⁷. Resolving the legal disputes over Okinotori, the Senkaku, and the South China Sea will require significant time and investment in international courts, and a one-size fits all solution is unlikely due to the complexity of these disputes. If a short-term resolution to these disputes is unlikely, the next-best step for the U.S. and its allies is to work with China in managing the disputes to prevent small skirmishes from escalating into broader military action.

The U.S. should also take into consideration that exploiting the uncertainty created from these legal disputes is at the core of China's gray zone strategy, and therefore it has an incentive not to participate in CBMs. Because of this, it is crucial that the U.S. work to improve its defensive capability in the Indo-Pacific, as well as apply multilateral and economic pressure in response to China's gray zone tactics, as noted in the other recommendations of this chapter. If China perceives a high cost to aggressively pursuing a gray zone activity, such as a response from U.S. military capabilities, a Japanese long-range strike capability, or international diplomatic and economic pressure, it would have more of an incentive to participate in maritime CBMs. Even if China continues with its gray zone strategy, the above combination of CBMs with other instruments of statecraft create strong incentives for China to not participate in gray zone activities involving the use of force or land grabs such as a fait accompli against the Senkaku.

²¹⁷ T. Lin, "Okinotori" *CSIS Maritime Transparency Institute*, June 17, 2016 <https://amti.csis.org/okinotori-new-beginning-taiwan-japan-maritime-dialogue/>

The U.S. should use multilateral pressure against China to hold its international prestige at risk for its gray zone activities.²¹⁸ Tangible steps the U.S. can take could involve a massive transparency campaign to highlight China's coercive activities as being in direct contradiction to international law to make it clear that the U.S. is defending the values of a free and open economy²¹⁹. Many states have sought to avoid becoming involved in a diplomatic dispute between the U.S. and China due to their economic reliance on China. If the U.S. can focus its transparency campaign on the threat China poses to economic growth, the U.S. may be more successful in rallying a coalition that allows for collective pressure that can constrain Chinese aggression.

In the case of Japan developing long-range strike capabilities, one important role of U.S. diplomacy will be to work with regional allies in explaining the rationale behind Japan's development of such weapons. With the current threat environment resulting in Japan expanding its interpretation of Article 9 of its constitution, the U.S. will have to assure its other allies that this does not signal the return of an imperial Japan but is a cooperative effort with the U.S. to deter Chinese expansionism. A more proactive Japan developing new capabilities and taking on more responsibility for its own defense will undoubtedly be a strong asset to the U.S. Communicating to allies and adversaries that the intent of deploying new capabilities is not meant to upset strategic stability will be essential to assure allies and prevent over-reactions and miscalculations from adversaries.

²¹⁸ "Gaining Competitive Advantage in the Gray Zone", RAND Corporation, 2019. https://www.rand.org/pubs/research_reports/RR2942.html

²¹⁹ H. Brands, "After the Responsible Stakeholder, What? Debating America's China Strategy", *Texas National Security Review*, Vol 2, no. 2 (2019) <https://tnsr.org/2019/02/after-the-responsible-stakeholder-what-debating-americas-china-strategy-2/>

Economic Actions

Regarding economic options, the U.S. should reserve the option to establish a sanctions regime to specifically target Chinese individuals and companies involved in gray zone activities.²²⁰ In addition to demonstrating a clear cost to Chinese decision-makers for their activities, applying targeted sanctions would help to show the international community which specific Chinese actors are acting in bad faith and that the U.S. is capable of still working with China on other areas of the economy while not tolerating areas in which China is exploiting international law.²²¹ Such sanctions are unlikely to have a significant impact on China's overall economic outlook, but would serve as a symbolic response to highlight to the international community the specific ways that China is using its military might to undermine the liberal order.

To summarize, there is not a silver bullet solution in addressing the challenges the U.S. and Japan face in the Pacific. The two allies will have to work together and utilize all instruments of statecraft to address the current threat. In terms of policy, the U.S.-Japan Mutual Defense Treaty must be updated to account for the modern threat environment so that Japan can take on a larger role in providing for its own security. This can be accomplished by top level meetings between security and executive branch officials in both states, as well as working with Japan to develop their own Law of War Manual. Militarily, the U.S. and Japan must have a strong offensive and defensive deployed capabilities. This can be achieved if the U.S. works with Japan to develop a long-range strike capability, as well as continue to develop missile defense

²²⁰ O. Mastro, "Military Confrontation in the South China Sea", *Council on Foreign Relations*, May 21, 2020. <https://www.cfr.org/report/military-confrontation-south-china-sea>

²²¹ M. O'Hanlon, "The challenge of confronting China over a gray zone crisis", *Brookings*, July 11, 2019. <https://www.brookings.edu/blog/order-from-chaos/2019/07/11/the-challenge-of-confronting-china-over-a-gray-zone-crisis/>

capabilities and harden critical bases and infrastructure. Diplomatically, the U.S. and Japan should work with China, when possible, to develop Confidence Building Measures to address gray zone contingencies. When working with China is not possible, the U.S. and Japan should work with other countries to apply diplomatic pressure against China for violating international law. Additionally, the U.S. and Japan should work to develop sanction regimes against China in scenarios where diplomatic pressure is insufficient. These recommendations are not meant to be exhaustive but are meant to provide a starting point for addressing the unique threat posed by gray zone activities and missile proliferation in the Indo-Pacific.

CONCLUSION

The U.S.-Japan alliance has been the bulwark of Asian stability for the past half century. Over time however, that preeminence has been faced with a multitude of evolving challenges, and the ones the alliance faces today are greater than ever. Facing these challenges requires more than just funding new programs through the Pacific Deterrence Initiative (PDI). It will require assessing which new and existing capabilities will provide the U.S. with the greatest strategic value.

In conclusion, the thesis of this paper suggests that the United States should revise the U.S.-Japan Mutual Defense Treaty to synchronize U.S. and Japan legal doctrines for military operations and use that new legal framework to expand the role Japan plays in providing for its own security, specifically through the authorization of long-range counterstrike deployment. Expanding Japan's role as a provider of security will be essential as U.S. adversaries in East Asia continue down the path of military modernization. As the capabilities of these adversaries grow, empowering U.S. allies will be critical in maintaining a free, open, and safe Indo-Pacific.

In the case of Okinotori, the U.S. must be cognizant of the double standard of defending Japanese claims over Okinotori while simultaneously condemning Chinese claims in the South China Sea. However, U.S. policy must also recognize nuance, and pressuring Japan to give up its claims without having a credible and verifiable agreement from China to do the same would be detrimental to both U.S. defense posture and the ability to assure allies. In the meantime, the U.S. and Japan should seek to manage current disputes over Pacific Islands, by establishing confidence building measures that seek to promote freedom of passage and safety for commercial vessels.

With gray zone activities increasingly becoming a focus in the strategy of great power competition, the U.S. and Japan must update their doctrines governing the use of force to respond to these new contingencies. By modifying the U.S.-Japan Mutual Defense Treaty (MDT) to limit the conditions under which Article 5 can be activated, the U.S. and Japan can reduce the legal uncertainty stemming from having different self-defense doctrines. This modification will help the U.S. and Japan build legitimacy for new Japanese military capabilities that can serve to enhance the defense posture of both nations.

The advantage of waging conflict in the gray zone is that it seeks to exploit legal inconsistencies between allies, and the failure to develop a comprehensive strategy to address these scenarios will embolden Chinese assertiveness as it seeks to normalize its military presence in the Indo-Pacific. By cooperating with Japan to establish basic frameworks for gray zone responses, such as assisting Japan in developing its own Law of War doctrine, and exploring gray zone vulnerabilities through joint exercises and war games, the two allies can enhance interoperability and establish synchronization that allows for effective responses to Chinese coercion and can form the basis of rallying multilateral support against violations of international law.

It may have taken some time for the U.S. to get serious about competition with China, and the PDI is a welcoming start. But there is still much the U.S. can do to get back into the game of Asian power politics. The threats the U.S. faces are constantly evolving, and the U.S. and its allies will have to evolve as well to maintain regional stability. Expanding the traditional role of U.S. allies will be crucial as Asia once again becomes a hub for great power competition.

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