

Focus: The New National Security Strategy and International Law
(Summary)

Essay: Reading the New National Security Strategy from an International Law Perspective

Masahiko Asada (Professor, Faculty of Law, Doshisha University)

On December 16, 2022, Japan's National Security Strategy, the country's basic national security policy, was revised for the first time since its formulation in 2013 and approved by the Cabinet as the new "National Security Strategy". The new National Security Strategy takes a panoramic view of international relations, where confrontation and cooperation are intricately intertwined, and adopts the approach of integrating national responses at a higher level by taking full advantage of comprehensive national power, including diplomatic, defense, and economic capabilities. The strategic guidelines and measures presented therein represent a major shift in Japan's postwar security policy from a practical standpoint and raise important issues from the perspective of international law. This paper will examine three interesting aspects from that perspective: the rule of law, counterstrike capabilities, and economic security.

1 "Counterstrike Capabilities" in Japan's New National Security Strategy and the Right of Self-Defence under International Law

Sayoko Tanaka (Professor, Faculty of Law, Hosei University)

In December 2022, the Japanese government adopted its new National Security Strategy, by which the possession of "counterstrike capabilities" was officially upheld. Anticipating the criticisms that the exercise of such capabilities could be violative of obligations under international law, the government reaffirms that it would never use its military force without acknowledging the existence of a prior armed attack. This is in line with the conditions for the lawful exercise of self-defence under international law insofar as the use of force may be justified in certain circumstances even before an attack reaches the territory of State being subject to that attack. The problem remains, however, to define the precise conditions for the lawful exercise of such counterstrike capabilities since the rules of international law do not provide clear-cut criteria as to when an armed attack begins. It would thus be advisable for the government to carefully obtain and evaluate evidence affirming the commencement of armed attack before it decides to exercise its counterstrike capabilities.

**2 Counterstrike Capability and Issues under the Law of Armed Conflict:
With a Focus on the Debate over Dealing with Incidental Damage**

Susumu Nakamura (Senior Research Fellow, Keio Research Institute at SFC / Visiting Fellow,
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Japan has heretofore devised the Civil Protection Law and other laws to protect civilians in the event of an emergency, but these laws have been exclusively directed at civilians located in Japan. With the acquisition of counterstrike capability, it will become necessary to address a new issue of civilian protection in armed conflict: the protection of civilians from attacks by Japan's own forces rather than the protection of Japanese civilians from enemy attacks.

This paper summarizes the issues in the debate over a Japanese attack on enemy territory and

focuses on the need for coordination in selecting attack targets and dealing with collateral damage associated with an attack on enemy territory, which is a prerequisite for Japan-US joint operations and which differs from the information exchange that has been conducted in conventional Japan-US joint operations due to differences between the Japanese and American legal systems. In this context, coordination of responses under constitutional restrictions, the “calculation method” formulated by the US for mitigating incidental damage that has also been adopted by NATO countries, and discussions by experts who point out problems arising from differences in legal systems between the US and allies other than Japan are also referenced in examining the approaches Japan should adopt in acquiring counterstrike capabilities.

3 The International Legal Framework for Japan’s Active Cyber Defense: Exploring Legal Justification through the Lens of Measures Short of Armed Force and Circumstances Precluding Wrongfulness

Masahiro Kurosaki (Professor, National Defense Academy of Japan)

The international legal framework governing Active Cyber Defense (ACD) focuses on the principles of nonuse of force, non-intervention, and sovereignty. However, it is difficult to predict when cyber actions implemented as ACD might violate these principles, as this would depend on the specific circumstances and on the views of other countries.

For this reason, circumstances precluding wrongfulness play an important role in ensuring the legality of Japan’s ACD. Countermeasures and the plea of necessity are possible options in this regard, but it should be noted that these grounds cannot override the illegality of the use of force. Furthermore, insofar as ACD is carried out to counter the possibility of cyberattacks below the threshold of armed attack, it cannot be justified by the right of self-defense, which is conditioned on the occurrence of an armed attack. Therefore, in implementing ACD, cyber actions must be restrained so that they do not lead to the use of force prohibited by international law.

4 Maritime Security and International Law: The Position of Maritime Law Enforcement Agencies in the Event of Armed Conflict

Yumi Nishimura (Professor, Graduate School of Arts and Sciences, The University of Tokyo)

The National Security Strategy, approved by the Cabinet in December 2022, lists the promotion of maritime security and the enhancement of maritime security capabilities as a priority policy issue. It accordingly calls for the constant strengthening of cooperation and coordination between the Japan Maritime Self-Defense Force (JMSDF) and the Japan Coast Guard (JCG), including control over the JCG by the Minister of Defense in the event of an emergency. In response, guidelines for control of the JCG by the Minister of Defense were established in 2023.

An appropriate division of roles between the JMSDF and the JCG in the event of a contingency is essential for the efficient operation of their assets, and establishing control guidelines is a significant first step in this direction. However, the distinction and coordination between the military and law enforcement agencies, especially in the maritime domain, varies from country to country, and it is not unusual for law enforcement agencies to function as part of the military. Even if the JCG’s non-military status is guaranteed under domestic law, it is undeniable that, given such an international environment, placing the JCG under the control of the Minister of Defense may affect the status of JCG patrol vessels under the law of armed conflict. To secure the status of patrol vessel crews under the law of armed conflict, it is necessary to sort out the best approaches to control, taking the laws of naval warfare fully into account.

5 Space Security and International Law

Setsuko Aoki (Professor, Keio University Law School)

There is no doubt about the legality under international law of ensuring “security from space” in achieving Japan's goals set forth in the new National Security Strategy in the context of space activities. At the intersection of “security in space” and “security from space,” the biggest challenge is to deter, disrupt and defeat anti-satellite (ASAT) attacks manifested in rendezvous and proximity operations (RPO) for which there are no clear provisions in international space law. This point can be addressed by focusing on international space law, which does not distinguish between military and civilian satellites, and making efforts to clarify the criteria for the “due regard” obligation in Article IX of the Outer Space Treaty. Japan should endeavor to establish the Space Traffic Management (STM) Guidelines, which have been developed as conditions for authorizing satellite control under the Space Activities Act, as a normative set of international standards. It is also important to educate the public to reinforce the norm of banning ASAT tests using direct ascent missiles as resolved by the UN General Assembly.