

The Bush Strategy and Japan's War Contingency Laws

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This article traces the fundamental shifts in Japanese contingency planning for war under pressure from the start of the Bush administration and particularly since 9/11. The author shows that the Koizumi administration's security policy, and particularly the War Contingency Laws that passed the Diet on May 15, 2003, are not only in violation of the no war clause in the Japanese Constitution but constitute a dramatic extension of the U.S.-Japan security relationship that is at odds with the interests of the people of Japan and Asia. Asai Motofumi, the former head of the Foreign Ministry's China Division, is a professor at Meiji Gakuin and the author of numerous articles and books on Japanese global policy. The article appeared in the February, 2003 issue of *Gunshuku Mondai Kenkyujo*.

1. The Bush Administration's View of War with Iraq

In September 2002, the Bush administration announced what has come to be called the National Security Strategy (hereafter NSS). The most important dimensions of this document are its abnormal level of threat perception and its arguments for the normality of preemptive attacks.

A. Threat Perception

The abnormal level of threat perception arises from the belief that deterrence has no effect on rogue states and terrorists. The NSS puts it this way: "[D]eterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their own people, and the wealth of their nations." The danger is great because rogue states might provide weapons of mass destruction to terrorists. In

sum, "deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents."

The pathological nature of this perception of threat is immediately obvious. Let's accept, for purposes of argument, the existence of "rogue states." But the theory that such a state might choose to accept the destruction of its own power base in order to attack the U.S. (having launched its few missiles at the U.S., it would in the next instant see its own homeland reduced to ashes by American retaliation) is too far removed from reality.

The same applies to the possibility that a "rogue state" might supply weapons of mass destruction to terrorists. Given its intelligence capability, the U.S. would quickly become aware of that sort of transaction. It is easy to imagine that the result would be massive American retaliation. American failure, despite exhaustive efforts, to demonstrate a link between Iraq and terrorists should be sufficient to suggest that the NSS's contention regarding such links does not necessarily hold.

Ironically, the only situation in which the American contention might hold is if the "rogue state" were to become convinced that an American attack is inevitable. That is, if its leaders believe that the U.S. is sure to attack in any case, their desperation might result in irrational behavior.

B. Preemptive Self-Defense

However, without bothering with detail, the NSS offers only a simple justification for preemptive attack: "nations need not suffer an

attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack." Nevertheless, one could argue that this only legitimizes preemptive self-defense in a case of imminent danger.

It is widely recognized that under international law the right of self-defense can justifiably be exercised only if the following three conditions are satisfied: the threat must be imminent and illegitimate, there must be no other means of defense available, and only the minimum necessary force can be employed. The NSS, on the other hand, ignores two of the three conditions as well as the "illegitimate" portion of the first, so that "imminence" alone becomes the sole criterion for preemptive self-defense.

The NSS also states that because rogue states will rely on terror and WMD, it is necessary to "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." On the basis of the logic that "The greater the threat, the greater is the risk of inaction," the NSS continues, "and the more compelling the case for taking anticipatory action to defend ourselves."

This doctrine is extremely problematical even when viewed in light of the following points. First, as noted, it selects only "imminence" from the three usual conditions for exercise of the right of self-defense. Moreover, Article 51 of the United Nations Charter clearly includes the caveat that the right of self-defense is applicable "in cases in which an armed attack has occurred," and the NSS also completely ignores this point. It also ignores the lack of realism in the notions that "rogue states" might launch preemptive attacks, or provide WMD to terrorists.

It is worth emphasizing that the NSS itself demolishes, in effect, the doctrine of "imminence." That is, the NSS states that anticipatory action must be taken even if the time and place of the enemy's attack is

uncertain. But, surely, taking anticipatory action despite uncertainty is inconsistent with the condition of "imminence," which presumes a certain degree of certainty that an attack will occur. It should be quite clear, then, that as formulated in the NSS the Bush administration's argument for preemptive war on Iraq (in the first instance, then other rogue states) is unacceptable.

Moreover, it should be pointed out that U.N. Security Council resolution 1441, which was passed with Iraq in mind, did not necessarily take into account the U.S.'s doctrine of preemptive self-defense. The resolution says, "recognizing the threat Iraqi non-compliance with Council's resolutions and proliferation of weapons of mass destruction and long-range missiles poses to the international peace and security," the Security Council will act under Chapter seven of the UN Charter. However, regarding Iraq's violation of this resolution, it says merely that, "Iraq will face serious consequences," leaving vague just what measures ought to be taken. It does not invoke collective measures under the UN Charter. On this point, we should closely watch future developments.

2. Origins of the War Contingency System and the "New Guidelines"

A. The Truth of "Nuclear Suspicions" Regarding North Korea

Frankly speaking, one gets the impression that the origins of today's debate over the war contingency system are not well known. Beginning in the early 1990s, the U.S. suspected that North Korea was developing nuclear weapons and tried to persuade the Koreans to abandon that effort. North Korea denied the American charges, international agencies got involved, and it became an international issue. The U.S. subsequently decided that diplomacy was achieving nothing and around 1993 began moving toward a preemptive strike on nuclear facilities in order

to stop development.

Limiting our discussion here to aspects related to Japan's war contingency system, suffice it to say that the U.S., which planned to use bases in Japan as the staging areas for its strike on North Korea, naturally anticipated the possibility of retaliatory attacks on Japan by North Korean guerrilla forces and thus issued to Japan a set of demands that included some 1,059 items. Japan's efforts to satisfy those demands made establishment of a legal system to deal with war contingencies inevitable. However, as it turned out, former U.S. president Jimmy Carter was able to visit North Korea and meet with Kim Il Sung, and the danger of war receded. Thus, Japan did not at this stage go to the point of establishing a system to deal with military emergencies.

B. Foundation for the War Contingency System: The New Guidelines

A Korean crisis was temporarily averted, but this series of events made the U.S. keenly aware that Japan's lack of a legal framework to deal with foreign attack might impede American military operations and thus cause the U.S. to put urgent pressure on Japan to set up such a system. In order to understand Japan-U.S. relations in the 1990s it is helpful to refer to the so-called Armitage report of October 2000.

Concerning the Japan-U.S. security relationship following the end of the Cold War, the report says, "The drift in the alliance was obvious until the mid-1990s when the crisis on the Korean peninsula&captured the attention of policymakers in Washington and Tokyo." It goes on, "The subsequent Taiwan Strait confrontation in March 1996 gave even more impetus to efforts on both sides of the Pacific to reaffirm the bilateral security alliance."

Under the strong pressure from the U.S. that accompanied those events, the Japan-U.S. Joint Declaration on Security was prepared, leading

to an agreement to review the existing (1978) Guidelines for Japan-U.S. Defense Cooperation and, ultimately, to establish the New Guidelines in 1997. Concerning this, the Armitage report says "The 1996 U.S.-Japan Joint Security Declaration went a long way toward directing attention in both capitals toward the need to refurbish the alliance, and led to concrete changes that updated defense ties in the form of the revised Guidelines for U.S.-Japan Defense Cooperation&"

It was on the basis of the New Guidelines that the 1999 bill regarding security in "situations in areas surrounding Japan" was passed. However, the report apparently finds that law alone to be unsatisfactory, saying, "But the symbolism of the 1996 declaration stood alone, unsupported by sustained high-level attention. As a result, the United States and Japan soon returned to bickering and poor policy coordination."

The above caveat should be understood to refer to the statement even in the New Guidelines, under "Basic Premises and Principles," that, "Japan will conduct all its actions within the limitations of its Constitution and in accordance with such basic positions as the maintenance of its exclusively defense-oriented policy and its three non-nuclear principles." To cooperate with the U.S. within the constraints of the Constitution means precisely to obey the constraints of Article Nine, and thus not to become involved in collective self-defense. However, the war contingency laws cannot be adhered to without exceeding those constraints.

The Armitage report insisted that the New Guidelines should be considered as "the floor--not the ceiling--for an expanded Japanese role in the transpacific alliance," and thus demanded that Japan fully cooperate militarily with the U.S. by formulating an emergency legal system that provides for participation in collective self-defense. It is true that the

Armitage report did not call for revision of Article Nine. However, it is all too clear that the report does intend that Japan should take the plunge to collective self-defense. Now that the main author of the report, Richard Armitage, has become the number two person in the State Department under the Bush administration, it seems clearer than ever that the report can be taken as a statement of American policy toward Japan.

Within Japan, at the end of 2001 Prime Minister Koizumi suddenly began to talk about a framework of war contingency laws, so observers came to understand that the establishment of such a framework was the policy of the government and the Liberal Democratic Party. However, the truth is that this was the result of American demands since the beginning of the Bush administration that, in accord with the deal concluded via the New Guidelines, Japan should construct an emergency system that goes beyond constitutional constraints.

The September 11, 2001 incident led to intensified American pressures. In Japan at the time, attention was focused on the Anti-Terrorism Special Measures Law. But what was most likely uppermost in the minds of Americans was Japan's lack of a war contingency system that would enable it to protect American forces in Japan that were placed on highest alert in the wake of the incident.. One can easily imagine that this incident strengthened American pressures on Japan to establish such a system of laws.

3. The U.S.-Japan Security Framework under the New Guidelines

The various provisions of the three war contingency bills, including the Law Concerning a Condition of Armed Attack, have already attracted a great deal of commentary. Here I will focus on the question of what sort of Japan-U.S. military alliance is envisioned in these three bills, which are premised on the

obliteration of the constraints of Article Nine of the Constitution. My conclusion is that they go far beyond the purview of the Treaty of Mutual Cooperation and Security of 1960, and move in the direction of a qualitatively new military alliance. I will call that new alliance the "New Guidelines alliance." It is a different alliance based on the New Guidelines and the resultant Law Concerning Situations in Areas Surrounding Japan and the three war contingency laws. The changes it embodies can be summarized in the following way:

The 1960 Alliance

- is for defensive purposes
- is to deal with situations on the Japanese homeland
- requires prior consultation
- calls for action only by the Japanese Self-Defense Forces
- respects international law

The "New Guidelines" Alliance

- is for offensive purposes
- is to deal with situations occurring anywhere
- does not require prior consultation
- calls for action by the nation as a whole
- ignores international law

A. From Defense to Attack

Article V of the 1960 Japan-U.S. Security Treaty provides as follows: "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."

According to this and the explanations offered by successive Japanese governments, the primary purpose of the 1960 alliance is to defend Japan.

By contrast, the New Guidelines say in Section V that "Situations in areas surrounding Japan will have an important influence on Japan's peace and security." It also provides that, "The two Governments will take appropriate measures, to include preventing further deterioration of situations, in response to situations in areas surrounding Japan. & They will support each other as necessary in accordance with appropriate arrangements."

In other words, the New Guidelines provide that even in the absence of an attack on Japanese territory, Japan will actively cooperate with American military actions. This is the substance of the transition from an alliance based on defense to one based on attack.

B. Situations Beyond the Homeland

The 1978 Guidelines clearly presumed a focus on aggression against the homeland of Japan. However, this is by no means true of the New Guidelines. The difference is suggested in section V entitled "Cooperation in Situations in Areas Surrounding Japan that will have an Important Influence on Japan's Peace and Security (Situations in Areas Surrounding Japan)," which states merely that, "When the two Governments reach a common assessment of the state of each situation, they will effectively coordinate their activities." Also, in "IV. Actions in Response to an Armed Attack Against Japan," we find the caveat that "Bilateral actions in response to an armed attack against Japan remain a core aspect of U.S.-Japan defense cooperation."

In other words, American and Japanese responses will be "effectively coordinated" not only when there is an emergency related to the homeland but when one occurs outside it as

well. The broadening of the scope of military cooperation beyond Japan proper is quite clear.

C. The Disappearance of Prior Consultation

In Article VI, the 1960 treaty provides that, "For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air, and naval forces of facilities and areas in Japan." However, in an exchange of official memoranda attached to the treaty, one finds the provision that any use of facilities and areas in Japan as bases for U.S. combat missions will be subject to prior consultation with the Japanese government. In other words, under the 1960 treaty, American use of bases and other facilities is not unconditional.

Put more simply, if in the judgment of the Japanese side a situation has some impact on Japan's peace and security, the U.S. would be allowed to use the bases; if not, such use would be refused (making it impossible for the U.S. to launch a war from Japan). That is the meaning of prior consultation.

However, as already mentioned, the New Guidelines provide in advance that, "Situations in areas surrounding Japan will have an important influence on Japan's peace and security." If all such situations have an impact on Japan's peace and security, there is clearly no need for prior consultation. That is how the New Guidelines alliance has eliminated prior consultation.

D. Toward National Mobilization

The 1978 Guidelines, which were based on the provisions of the 1960 Security Treaty, declare that it is the Self-Defense Forces that will take action in case of a situation or incident. For example, Section I provides that in order to respond jointly in case of an armed attack on Japan, the Self-Defense Forces will make common preparation with U.S. Forces in areas

such as strategy, information, and rear support. In fact, in the healthy political climate of that time, the mere mention by a government official of plans to mobilize the general public in time of emergency would most likely have touched off sufficient uproar to bring down the cabinet.

In the era of the New Guidelines alliance, however, we find statements everywhere that reveal an intent to mobilize the nation. For example, in the New Guidelines under "III. Cooperation Under Normal Circumstances," it says, "3. Both Governments will conduct bilateral work, including bilateral defense planning in case of an armed attack against Japan, and mutual cooperation planning [sic] in situations in areas surrounding Japan. Such efforts will be made in a comprehensive mechanism involving relevant agencies of the respective Governments, and establish the foundation for bilateral cooperation. Bilateral exercises and training will be enhanced in order not only to validate such bilateral work but also to enable smooth and effective responses by public and private entities of both countries, starting with U.S. Forces and the Self-Defense Forces." Thus, even in normal times there are plans to mobilize not only public but private organs as well (in fact, this sort of activity is already routine).

That is not all. Under "IV. Actions in Response to an Armed Attack Against Japan," in the section entitled "2. When an Armed Attack against Japan Takes Place," subsection "(3) Activities and Requirements for Operations," we read, "U.S. Forces and the Self-Defense Forces will conduct logistics support activities efficiently and properly in accordance with appropriate bilateral arrangements. To improve the effectiveness of logistics and to alleviate functional shortfalls, the two Governments will undertake mutual support activities, making appropriate use of authorities and assets of central and local government agencies, as well as private sector assets." It is clear that in

addition to the central government, there are plans to mobilize public institutions and organizations in local areas and the private sector as well.

We can find the same sort of language in "V. Cooperation in Situations in Areas Surrounding Japan." In section "2 Responses to Situation in Areas Surrounding Japan," part "(2) Japan's Support for U.S. Forces Activities," it states, "In providing rear area support, Japan will make appropriate use of authorities and assets of central and local government agencies, as well as private sector assets." Thus, again we find confirmation of intent to mobilize local government and private entities.

We often tend to think that national mobilization for security purposes was contemplated for the first time in the three war contingency bills, but as we have seen, this is incorrect. It was already included in the New Guidelines of 1997. These provisions lay bare the most dangerous aspect of the New Guidelines, which have effectively voided the constraints imposed by Article Nine.

E. From Respecting to Ignoring International Law

Article VII of the 1960 Peace Treaty says that "This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security." In this way, the treaty makes it quite clear that the necessary conditions for exercising the right of self-defense that are spelled out in the UN Charter apply to the Japan-U.S. Security Treaty as well. This would not only strictly disallow any Japanese cooperation in an American preemptive attack on North Korea, as was contemplated in the case of the "nuclear suspicions" mentioned above; it also makes improper any Japanese cooperation with the Bush administration's

brazen, preemptive attack on Iraq.

Nevertheless, it says in the New Guidelines "II. Basic Premises and Principles" section 3 that, "All actions taken by the United States and Japan will be consistent with basic principles of international law, including the peaceful settlement of disputes and sovereign equality, and relevant international agreements such as the Charter of the United Nations." This is tantamount to declaring that by definition all acts of war carried out by the United States are consistent with international law. (It should be noted that in the case of the New Guidelines only the English version is official; the Japanese version is merely a translation. Therefore, it is

clearly significant that the Japanese version has the equivalent of "will most likely be consistent" (gatchi suru de ari¹/₂) where the English says "will be consistent.")

In consideration of all this, I think we have to conclude that on these matters the servile policy toward the U.S. of the Japanese government and the ruling party have reached an extreme. It is as if Japan had announced in advance that it would support the U.S.'s attack on Iraq. Clearly the term "rogue state" ought most properly to be applied to the United States and its faithful servant, Japan.

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