

Article 9 of the Japanese Constitution Revisited in the Light of International Law

Hitoshi Nasu *

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Abstract

With the controversial overseas dispatch of the Japanese Self-Defense Force to Iraq, Japan seems to be seizing the real opportunity to amend the famous war-renunciation provision – Article 9 of the Japanese Constitution. The ambiguity inherent in Article 9 might have rendered itself unhelpful for testing the Government's decisions. It also might have helped illegitimate military actions being undertaken secretly. However, a viewpoint from the international legal perspective will throw light on the rationale of Article 9 to ascertain the envisaged scope of restriction. It may well redeem the ambiguity in Article 9 and reassert its significance in the modern context.

Article 9 of the Japanese Constitution

(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognised.

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I. INTRODUCTION

Yet another controversy on Article 9 of the Japanese Constitution has arisen over the dispatch of Japanese Self-Defense Force (SDF) to Iraq,¹ after the coalition forces led by the United States (U.S.) and United Kingdom forcefully destroyed the Iraqi Government.² While the SDF contingents were dispatched in the face of strong protests, it seems that the constitutionality of its decision was left once again unresolved. It may be argued that there is a reasonable ground for throwing doubt on the validity and efficacy of Article 9 in the modern context. It is always dangerous to jump to a conclusion. It is one issue whether the meaning of Article 9 can be ascertained to measure the legality of the SDF operations, whereas it is another whether the significance and validity of Article 9 is lost. Ambiguities in a rule do not necessarily invalidate the rule. It is then to be asked whether and how the rationale and scope of Article 9 restriction can be identified to assess the SDF operations in its light.

However aspiring it may be, the text of Article 9 of the Japanese Constitution as well as its drafting process have left ambiguities, which have in effect set limitations on the legal analyses of this provision. While much of the study has focused on its drafting process, Government statements and judicial decisions,³ much attention should also be dedicated to examination of Article 9 in the light of international law. There is no doubt that the issue of national defense and security necessarily involves international aspects in a material sense, inasmuch as it encompasses the defense against external threats as much as against internal threats. It entails international dimensions in a legal sense as well, since there exist a number of international rules of law to regulate military conducts undertaken for the purpose of national defense and security, including notably the Charter of the United Nations (hereinafter the U.N. Charter).⁴ It is to be recalled that the Japanese Constitution itself acknowledges the significance of observing interna-

1 The history of Article 9 controversy is, in a sense, the history of Japan's security policy itself. While the controversy was all about the existence of the SDF, the focus has been shifted to the constitutionality of overseas dispatch of the SDF contingents since four mine-sweepers were sent for cleanup operations in the Persian Gulf in 1991.

2 This issue will be dealt with at length below in Section 4-B-ii.

3 See, e.g., M.J. GILLEY, Japan's Developing Military Potential within the Context of Its Constitutional Renunciation of War, in: *Emory International Law Review* 2000, 1681 *et seq*; S. MADSEN, The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role, in: (1993) 3 *Transnational Law and Contemporary Problems* 3 (1993) 549 *et seq*; J.E. AUER, Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World, in: *Law and Contemporary Problems* 53 (1990) 171 *et seq*; O. NISHI, *The Constitution and the National Defense Law System in Japan* (Tokyo 1987).

4 See especially, Art. 2 (4) of the U.N. Charter, which reads that, "[a]ll 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".

tional law in Article 98 (2).⁵ More importantly, the renunciation of war prescribed in Article 9 of the Japanese Constitution is reportedly consistent with Article 2 (4) of the U.N. Charter from the historical context leading up to the drafting of this provision.⁶

Given the external nature and international ramifications of Article 9, the interpretation of this provision would inevitably require an analysis of the legal restriction as applied in Japan under international law in terms of its national defense and security. From this point of view, this paper will examine to what extent the restriction arising from Article 9 is and can be deviated from that imposed under international law. To this end, it is proposed that the following two questions be examined:

- Whether (and if so, to what extent) Article 9 legally restricts the scope of the right of self-defense, individual or collective, as recognised in international law for its exercise; and
- Whether (and if so, on what conditions) Article 9 legally prohibits Japan from sending military troops to serve in U.N. military operations.

II. RATIONALE OF ARTICLE 9 TO RESTRICT THE USE OF ARMED FORCE

There are different views about the extent to which Article 9 of the Japanese Constitution restricts the existence as well as the exercise of military forces. Those views about the interpretation of Article 9 can largely be categorised into two schools of thought: one school argued that Article 9 renounced all wars and the use of armed force, whether aggressive or defensive; the other contended that Article 9 recognised the right of self-defense to be exercised by recourse to military forces if necessary.⁷ The consequences of pursuing the former argument are best illustrated by Hamura and Shiu, who explain that the absolute pacifism would interpret the provision in the following way:

Thus if the Japanese had to face any force, they would die without a fight. There is a cause of conscientious refusal to fight. Although some may find this view far-fetched, sceptics should recall the total devotion which the Japanese displayed to their Emperor during the Second World War; they will be prepared once again to show their devotion by dying for the sake of peace as a universal principle of mankind.⁸

5 Art. 98 (2) reads that, “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed”.

6 It is often pointed out that the drafting of Art. 9 of the Japanese Constitution followed the line of outlawing war, notably of the Kellogg-Briand Pact of 1928. See, *e.g.*, K. TAKAYANAGI, Some Reminiscences of Japan’s Commission on the Constitution, in: *Washington Law Review* 43 (1968) 974.

7 S. HAMURA / E. SHIU, Renunciation of War As a Universal Principle of Mankind – A Look at the Gulf War and the Japanese Constitution, in: *International and Comparative Law Quarterly* 44 (1995) 430-431.

8 *Ibid.*, 44.

The Japanese Government and the Judiciary have chosen rather not to follow the first school of thought, recognising the right of self-defense as a legitimate exercise of the sovereign powers.⁹ As far as Article 9 (1) is concerned, no restriction would be imposed upon the right of self-defense, just as Article 2 (4) of the U.N. Charter is balanced with Article 51 of the U.N. Charter.¹⁰ It would rather be Article 9 (2) of the Constitution that might restrict the manner and scope in which Japan can exercise the right of self-defense.

One may contend that, since Article 9 (2) proscribes the maintenance of any war potential, the Japanese people are only allowed to counter-attack by police forces or otherwise by uprising of the people. Nobody could deny, however, that an armed attack with modern advanced technology cannot effectively be resisted without certain strength of military forces. Asserting the total ban of the maintenance of any armed force even for the purpose of national self-defense, while acknowledging its military and tactical consequences, would oblige the Japanese people to fall into the same absurdity as the absolute pacifism would lead to. The abolition of military forces would, against the principle of effective interpretation, amount to nullify the purposes and spirit of Article 9 as well as the preamble of the Japanese Constitution.¹¹ The principle of effective interpretation would thus make it necessary to possess some level of military strength by virtue of the right to live in peace as embodied in the preamble and Article 9 of the Japanese Constitution. The problem is whether and to what extent Article 9 restricts the military capability that Japan could maintain in compliance with the limitation set forth in Article 9.

9 It has been clarified that the pacifism advocated in the Japanese Constitution was not meant to deny the right of self-defense as an inherent right of the nation. See, *e.g.*, *Japan v. Shigeru Sakata et al.*, Supreme Court, 16 December 1959, Keishu 13, 3225 *et seq.*; Engl. Transl.: Japanese Annual of International Law 4 (1960) 103 *et seq.* For an analysis written in English of this judgment, see, K. YOKOTA, Renunciation of War in the New Japanese Constitution: As Interpreted by the Supreme Court in the *Sunakawa* Judgement, in: Japanese Annual of International Law 4 (1960) 16 *et seq.* But see, *Ito v. Minister of Agriculture and Forestry*, Sapporo District Court, 7 September 1973, in: Hanrei Jihô 712 (1973) 24 *et seq.*

10 While Art. 2 (4) of the U.N. Charter prohibits the threat or use of force, Art. 51 provides an exception to the prohibition, stating that, '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

11 The preamble of the Japanese Constitution, in part, reads:
We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have *the right to live in peace*, free from fear and want (emphasis added).

Article 9 (2) has actually restricted the manner of exercising the right of self-defense in that every military facility has been assessed in the light of whether it would constitute the “war potential”. It has thus helped in limiting Japan’s military capabilities only to those of a defensive nature. The “three non-nuclear principles” can also be understood in this context.¹² Given that the actual statistics of Japan’s military capacity evidences its defensive nature,¹³ Haley concludes that Japan has “the most costly, advanced and well equipped armed forces in the region, one whose defensive capacity is second only to the United States but whose ability to project military power beyond its shores is relatively weak”.¹⁴

It is to be noted in this respect that Article 9 has produced a gap vis-à-vis the right of self-defense as recognised in general international law as well as under the U.N. Charter. The notion of the right of self-defense in international law has tended to be expanded in its actual exercise. An extreme defense action was eminently illustrated when the Israeli air forces attacked a nuclear reactor in Iraq in anticipation of Iraq possessing nuclear weapons, which would have posed a huge risk to the Israel’s national security.¹⁵ Israel and the U.S. also have justified armed reprisals against those states from which terrorist activities presumably originated, in the name of the right of self-defense, even in the absence of an imminent threat of further terrorist attacks.¹⁶ Most recently, the U.S. has advocated the notion of “pre-emptive self-defense” against remote, not imminent, security threats.¹⁷ Thus, the right of self-defense of states has in practice been widely interpreted, with a variety of justifications being sought for it by academics.¹⁸

12 The “three non-nuclear principles” are (1) that it will not possess nuclear weapons; (2) that it will not produce nuclear weapons; and (3) that it will not allow them to be introduced in Japan.

13 J.E. AUER, Article Nine: Renunciation of War, in: Luney / Takahashi (eds.), Japanese Constitutional Law (Tokyo 1993) 83.

14 J.O. HALEY, Waging War: Japan’s Constitutional Constraints (Draft paper, 2 October 2003) 21; available at <http://law.wustl.edu/Academics/Faculty/Workingpapers/WagingWar10_03.pdf> visited on 1 October 2004.

15 For details, see, e.g., A. D’AMATO, International Law and Political Reality: Collected Papers Vol. I (The Hague 1995) 247 *et seq.*; W.T. MALLISON / S.V. MALLISON, The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?, in: Vanderbilt Journal of Transnational Law 15 (1982) 417 *et seq.*

16 See, e.g., T.J. FARER / C.C. JOYNER, The United States and the Use of Force: Looking Back To See Ahead, in: Transnational Law & Contemporary Problems 1 (1991) 15 *et seq.*; B. LEVENFELD, Israel’s Counter-*Fedayeen* Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law, in: Columbia Journal of Transnational Law 21 (1982) 1 *et seq.*

17 See generally, A. GARWOOD-GOWERS, Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?, in: Australian Year Book of International Law 23 (2004) 51 *et seq.*; C. GREENWOOD, International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, in: San Diego International Law Journal 4 (2003) 7 *et seq.*; A.C. AREND, International Law and the Preemptive Use of Military Force, in: The Washington Quarterly 8 (2003) 94 *et seq.*

18 See, e.g., Y. DINSTEIN, War, Aggression, and Self-Defense (3rd ed., Cambridge 2001) 192-221.

Recall, however, that the Japanese aggression in Manchuria in 1932 was in effect carried out in the name of the right of self-defense.¹⁹ This event would suffice to indicate that the expansion of the concept of the right of self-defense in practice increases a risk that the maintenance of international peace and security might be endangered.

Concerned with the expansive nature of the right of self-defense in international law, it would instead be worthwhile for the gap created by Article 9 to be maintained, especially in the case of Japan. It has been pointed out that what has actually sustained the legitimacy of Article 9 is the fear felt both at home and abroad that “a retreat from the peaceful ideals noted in Article 9 may encourage the ‘revival of militaristic control’”.²⁰ The restricted interpretation of Article 9 in terms of the manner of exercising the right of self-defense has actually been successful in preventing this fear from becoming a real threat. Japan’s distinctive quasi-pacifism has thus proven that it is “not only an acceptable and desirable option, but also an imperative and realistic option for some countries, large and small”.²¹ The rationale of Article 9 may well lie in the role of preventing Japan from resorting to a more expansive exercise of the right of self-defense, which in the past amounted to an act of aggression. In light of this rationale of Article 9, it now turns to a question of how Japan’s commitment to the exercise of the right of collective self-defense and U.N. peace operations can be assessed.

III. ARTICLE 9 AND EXPANSIONISM OF THE U.S.-JAPAN SECURITY TREATY

1. *Purported Restriction of the Right of Collective Self-Defense*

The Japanese Government has taken a view, at least at a level of its defense policy, that Article 9 prohibits Japan from explicitly invoking the right of collective self-defense. The restriction upon Japan’s exercise of the right of collective self-defense was set when the U.S.-Japan Mutual Security Aid Agreement was replaced by the U.S.-Japan Treaty of Mutual Cooperation and Security (hereinafter: U.S.-Japan Security Treaty) in 1960,²² in the midst of controversy as to whether the existence of U.S. military bases in Japan was in contravention of Article 9 (2). Despite its character as a collective defense treaty, it stipulates that the obligation of collective self-defense arises when an armed attack occurs against U.S. or Japan *only* within the territories under the administration

19 For details, see, J.W. WHEELER-BENNETT, *Documents on International Affairs 1932* (Oxford 1933) 240-260.

20 GILLEY, *supra* note 3, 1695, quoting from *J.M. Maki* (trans. and ed.), *Japan’s Commission on the Constitution: The Final Report* (Seattle 1980) 267.

21 L.W. BEER, *Peace in Theory and Practice under Article 9 of Japan’s Constitution*, in: *Marquette Law Review* 3 (1998) 828.

22 *Treaty of Mutual Cooperation and Security between Japan and the United States of America*, signed on 19 January 1960, 11 UST 1632 *et seq.*

of Japan.²³ It also provides that the U.S. ‘is granted the use by its land, air and naval forces of facilities and areas in Japan’,²⁴ subjecting major changes in their equipment to prior consultations with the Japanese Government. The purpose of these provisions lay in dispelling the fear and suspicions that Japan would be dragged into the U.S. armed conflicts in the East Asia.²⁵ This politically motivated arrangement ultimately amounted to a notorious thesis of the right of collective self-defense: “Japan has the right of collective self-defense, but Article 9 prohibits Japan from exercising it”. While acknowledging its possession of the right of collective self-defense in international law, in other words, Japan has chosen not to exercise it by virtue of Article 9.

It is a controversial question whether Japan has been legally banned from, or has chosen as a legal policy to refrain from, exercising the right of collective self-defense. Some in fact argue that the exercise of the right of collective self-defense is permissible under Article 9 from its textual interpretation.²⁶ Given that the Japanese Government has not been so confident about the scope of prohibition under Article 9, it is likely that the Japanese Government has adopted the legal policy not to exercise the right of collective self-defense, in so far as the arrangements with the U.S. are concerned. It is rightly pointed out, moreover, that “the recognition alone by Japan of the stationing on its territory of such an armed force ... should be considered the exercise by Japan of the right of collective self-defense”.²⁷ This point of view clarifies that the legal policy adopted by the Japanese Government has in fact made the legal status of the right of collective self-defense in the context of Article 9 more ambiguous.

2. *Perceived Expansionism of the Right of Collective Self-Defense*

The scope in which the right of collective self-defense can be exercised has been, in reality, expanded in a way, relying on a politically and militarily expeditious arrangement. It may well be, in theory, that the politically motivated arrangement up to the level of cooperation as described above is not in contravention of Article 9, as long as the right of collective self-defense is exercised for the purpose of the defense of either

23 Art. 5 of the U.S.-Japan Security Treaty reads that, “[e]ach 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”.

24 Art. 6 of the U.S.-Japan Security Treaty reads that, “[f]or 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”.

25 T. MATSUDA, *The Japan-US Security Treaty and Japanese Laws*, in: *Japanese Annual of International Law* 39 (1996) 85-87.

26 H. NAGANO, *The Meaning of Article 9 of the Japanese Constitution*, in: Port / McAlinn (eds.), *Comparative Law: Law and the Legal Process in Japan* (2nd ed., Durham 2003) 239.

27 MATSUDA, *supra* note 25, 87.

party. A real legal issue arises, however, when it comes to the point where the scope of the right of collective self-defense extends to the areas surrounding Japan, as clarified in the Joint Statement on Review of Defense Cooperation Guidelines (hereinafter: 1997 Guideline) set in 1997,²⁸ pursuant to Article 6 of the U.S.-Japan Security Treaty.²⁹ Despite the basic premises recognising the limitations of Article 9 of the Japanese Constitution and consistency with the basic rules of international law,³⁰ the 1997 Guideline has raised a great concern about excessive use of Japan's military forces 'in situations in areas surrounding Japan' in contravention of the limitations imposed by Article 9.³¹ The concern would not be clarified, much less resolved, as long as the interpretation of Article 9 only attempts at tracing its history of controversy. This is the issue to be addressed in the light of the legitimate scope for exercising the right of collective self-defense in international law rather than in the light of the domestic debates on Article 9.

The Japanese Government has justified the cooperation 'in situations in areas surrounding Japan' by placing an emphasis on the nature of 'rear area support' to be provided for U.S. forces conducting operations for the purpose of achieving the objectives of the U.S.-Japan Security Treaty. It has explained that the assistance in a non-combat nature at a distance away from a battlefield would not constitute the use of armed force as contrary to Article 9. However, much of this rough and convenient view cannot be sustained. *Yoshihara* condemns that view, explaining that the distinction between front combats and rear area support is irrelevant in modern warfare.³² The elements contained in the use of armed force within the meaning of Article 2 (4) of the U.N. Charter are in fact not limited to actual exchange of shots.³³ As long as an armed attack

28 Japan-United States Joint Statement on Review of Defense Cooperation Guidelines, in: *International Legal Materials* 36 (1997) 1621 *et seq.*

29 Art. 6 of the U.S.-Japan Security Treaty envisaged from the beginning its functions in a broader context of the maintenance of international peace and security in the Far East: see, *supra* note 24.

30 Section II (2) of the 1997 Guideline reads 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 defensive-oriented policy and its three non-nuclear principles".

31 Section V of the 1997 Guideline stipulates on the cooperation "in situations in areas surrounding Japan that will have an important influence on Japan's peace and security". Although it is explained that "[t]he concept, situations in areas surrounding Japan, is not geographic but situational", it cannot be denied that it also covers geographical dimension in so far as the whole section would be applied outside of the territories under the administration of Japan.

32 T. YOSHIHARA, *Nichibei Anpo Jōyaku saiteigi to shūdanteki jieiken no kōshi* [Re-Definition of the U.S.-Japan Security Treaty and the Exercise of the Right of Collective Self-Defense], in: *Bōeihō Kenkyū* [Defense Law Review] 20 (1996) 50-52.

33 For instance, the U.N. General Assembly's Resolution on the Definition of Aggression lists, in Art. 3 (f) as an act of aggression, "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State". U.N. Doc. A/Res/3314 (XXIX) (14 December 1974).

is targeted at Japan or a state to which Japan is strongly related, Japan's involvement in counter-attacks is an exercise of the right of collective self-defense no matter how it commits itself.

It must be assured that the cooperative exercise of the right of collective self-defense in situations in areas surrounding Japan would not be invoked, until and unless Japan or the U.S. receives such a request from a state within the region. Nevertheless, this arrangement is clearly provocative in that it pre-arranges the cooperative exercise of the right of collective self-defense for other states or even for non-state entities which are not the parties to the treaty. A concern is, indeed, raised as to whether a Chinese invasion of Taiwan or an attack short of invasion would be considered as the situation in areas surrounding Japan.³⁴ If the rationale of Article 9 is to be found in the role to prevent Japan from resorting to a more expansive use of the right of self-defense, Japan would have to be cautious about this type of security arrangement whose scope could extend beyond Japanese territory.

A path toward a more obviously expanded exercise of the right of collective self-defense was laid when the Japanese Government, with the overwhelming Diet approval, dispatched, in November 2001, three SDF warships to be headed for Diego Garcia in the Indian Ocean in support of the U.S.-led military operation in Afghanistan. The U.S.-led military operation was reportedly based solely on the right of self-defense,³⁵ although several other legal justifications could also have been invoked.³⁶ Taking "its own initiative towards the eradication of terrorism, in cooperation with the United States",³⁷ the Japanese Diet enacted, on 29 October 2001, the Anti-Terrorism Special Measures Law,³⁸ based on which the SDF warships were dispatched. In the absence of

34 See, D. van HOFTEEN, *Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan*, in: *Hastings International and Comparative Law Review* 26 (2003) 300.

35 See, Letter dated 7 October 2001 from the Permanent Representative of the US to the UN addressed to the President of the Security Council, in: U.N. Doc. S/2001/946 (7 October 2001). For the theoretical justification, see, e.g., P. ROWE, *Responses to Terror: The New 'War'*, in: *Melbourne Journal of International Law* 3 (2002) 304-311.

36 See, M. BYERS, *Terrorism, The Use of Force and International Law After 11 September*, in: *International and Comparative Law Quarterly* 51 (2002) 401-406.

37 *Junichiro Koizumi*, Prime Minister of Japan, *Opening Statement at Press Conference* (19 September 2001), cited in: E.J.L. SOUTHGATE, *Comment: From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, in: *University of Pennsylvania Law Review* 151 (2003) 1620.

38 *Heisei 13 nen 9 gatsu 13 nichi no Amerika Gasshūkoku ni oite hassei shita terorisuto ni yoru kōgeki-tō ni taiō shite okonawareru kokusai rengō kenshō no mokuteki tassei no tame no shogaikoku no katsudō ni taishite wagakuni ga jisshi suru sochi oyobi kanren suru kokusai rengō ketsugi-tō ni motozuku jindōteki sochi ni kansuru tokubetsu sochi-hō*, Law No. 113/2001; Engl. Transl.: K. NAKATANI, *The Anti-Terrorism Special Measures Law*, in: *Japanese Annual of International Law* 45 (2002) 94-99.

specific authorisation by the U.N. Security Council of the use of armed force,³⁹ there seems to be little doubt that the deployment was the exercise of the right of collective self-defense.

It is considered that Japan dispatched the SDF contingents, not in a situation “in areas surrounding Japan” pursuant to the U.S.-Japan Security Treaty, but in response to the U.S. call for cooperation outside of the treaty framework.⁴⁰ It is obvious in this respect that this action dramatically deviated from Japan’s policy hitherto, formalistic or substantive, on the exercise of the right of collective self-defense. Some may argue that this deviation was possibly unconstitutional and would require Article 9 to be amended to reflect the liberal interpretation justifying fully the exercise of the right of collective self-defense.⁴¹ However, considering that Japan’s legal policy is not dictated by Article 9, but rather chosen for political reasons, it may well be possible to accommodate the exercise of the right of collective self-defense within the ambit of Article 9 restriction. The exercise would nonetheless have to be cautioned about, as the rationale of Article 9 would tell us that the right of collective self-defense be exercised according to a restrictive interpretation of the right under international law.

IV. ARTICLE 9 AND U.N. PEACE OPERATIONS

1. *Legality of Japan’s Participation in U.N. Peace Operations*

Japan’s official position had been that SDF would never be dispatched abroad for any purpose. This is because it has been believed that “even if Japan were to use force in accordance with resolutions of the United Nations, such use would be understood as acts by Japan; therefore this comes under the use of force by Japan, which the aforementioned Article 9 has renounced”.⁴² It has to be recognised that this view confuses the physical presence and the legal status of the Japanese SDF contingents. It is *ipso facto* Japanese contingents that participate in U.N. military operations, but they are *ipso jure* not qualified to exercise the sovereign right of Japan. As Judge *Owada* rightly points out, the restriction of the use of armed force under Article 9 “cannot, *ipso jure*, operate in such a way as to disqualify Japan from its participation in forces acting under the

39 Although the U.N. Security Council adopted a resolution under Chapter VII of the U.N. Charter, it merely imposed general obligations to combat threats to international peace and security caused by terrorist acts, wherein no specific authorisation of an enforcement measure against Afghanistan was made. See, U.N. Doc. S/Res/1373 (28 September 2001).

40 See, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits) ICJ Reports (1986) para. 232.

41 SOUTHGATE, *supra* note 37, 1621-1623, 1633-1635.

42 Japan, Minutes of the Budget Committee, House of Representatives, 129th sess., No. 18 (8 June 1994) 10 (per *Ôide*, Director-General of the Cabinet Legislation Bureau), cited in K. MORIKAWA / R. YAMAMOTO, National Implementation of United Nations Security Council Resolutions (1990-1998), in: Japanese Annual of International Law 42 (1999) 88.

command of the United Nations".⁴³ The Japanese SDF contingents deployed pursuant to the U.N. Security Council resolutions are thus placed under the U.N. command and, therefore, this deployment cannot be considered to be the use of armed force by the Japanese Government.

The question will then be asked whether Article 9 is construed as prohibiting the use of armed force to be placed under the U.N. jurisdiction for the purpose of maintenance of international peace and security, not as a means of settling international dispute for its own sake. It seems that the textual interpretation is sufficiently clear that the deployment of Japanese SDF contingents falls outside of Article 9 (1) by virtue of its purpose and, in so far as it is not to be used as 'war potential' exceeding the U.N. competence, also outside of Article 9 (2). From a legal point of view, therefore, Article 9 cannot be construed as prohibiting Japan from sending armed troops to serve in U.N. military operations for the purpose of the maintenance of international peace and security, as long as they are duly authorised pursuant to the provisions of the U.N. Charter.

A question may be raised whether Japan has an obligation to contribute to the U.N. peacekeeping operations by sending Japanese SDF contingents to be deployed as part of U.N. forces. Japan, as a member state of the U.N., is bound to comply with the decisions of the U.N. Security Council by virtue of Article 25 of the U.N. Charter,⁴⁴ not to mention Article 98 (2) of the Japanese Constitution. In cases of participation in U.N. military operations, however, the way of implementing the binding decisions is basically left to the discretion of each individual state,⁴⁵ until and unless a special agreement is concluded pursuant to Article 43 of the U.N. Charter.⁴⁶ Hence, Japan is not legally required to send armed troops to serve in U.N. peace operations. Strong claims made from abroad during the U.N. military operation in the Gulf Crisis should be seen as political pressure, in view of Japan's large military capacity. It seems, however, that the internal and external political pressure has distorted the legitimate application of Article 9, as will be explained below, leading, on the one hand, to the negative involvement in the

43 H. OWADA, Japan's Constitutional Power to Participate in Peace-Keeping, in: *New York University Journal of International Law and Politics* 27 (1997) 282.

44 Art. 25 of the U.N. Charter reads that, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

45 K. HIROBE, Article 98 Paragraph 2 of the Constitution of Japan and the Domestic Effects of Resolutions of the United Nations Security Council, in: *Japanese Annual of International Law* 36 (1993) 27; R.B. FUNK, Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions, in: *Cornell International Law Journal* 25 (1992) 389-395.

46 Art. 43 (1) of the U.N. Charter reads that, "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security".

field, and to the excessively active involvement in multinational military operations undertaken outside of the U.N. authority on the other.

2. *Distorted Effects of Article 9 on Japan's Participation in U.N. Peace Operations*

a) *Negativism of Japan's Participation*

Given strong pressure from abroad in the early 1990s, Japan finally adopted the Law Concerning Cooperation with United Nations Peace-Keeping Operations and Other Operations (hereinafter: PKO Law),⁴⁷ to enable Japan to get actively involved in U.N. peacekeeping operations. Due to inappropriate and negative application of Article 9 in response to strong public opposition to the despatch of the SDF abroad,⁴⁸ however, the provision of Japanese SDF contingents has been constrained by five principles:

- (1) the existence of a cease-fire agreement;
- (2) the existence of the consent of the parties to armed conflict;
- (3) impartiality;
- (4) withdrawal at its own will in cases where the above requirements cease to be satisfied; and
- (5) minimum use of weapons necessary to protect personnel's lives.⁴⁹

Strict adherence to these principles would indeed nullify the effects of their presence in the field. After all, as *Shibata* observes, "if there were a complete and permanent cease-fire with no possible violations, peacekeepers would be unnecessary".⁵⁰

The Japanese Government's sensitivity to the issue of use of armed force in relation to Article 9 has the most direct impact upon the extent to which the use of armed force is allowed for the SDF personnel. Thanks to the limitation imposed upon their use of armed force, Japanese contingents may not assist U.N. peacekeepers from other states, nor ensure the success of the U.N. missions. Unjustifiable limitation on the use of armed force only to the exercise of the right of self-defense is manifested when it refers to the legitimate self-defense prescribed in the domestic criminal code.⁵¹ It is pointed

47 *Kokusai rengō heiwa iji katsudō-tō ni taisuru kyōryoku ni kansuru hōritsu*, Law No. 79/1992, as amended by Law No. 157/2001; Engl. Transl.: Japanese Annual of International Law 36 (1993) 272 *et seq.*

48 W. TSUTSUI, Conceptions of Japan's Security Affecting Cooperation with the United Nations, in: Victoria University of Wellington Law Review 27 (1997) 10.

49 See, S. YANAI, Law Concerning Cooperation for United Nations Peace-Keeping Operations and Other Operations – The Japanese PKO Experience – , in: Japanese Annual of International Law 36 (1993) 41.

50 A. SHIBATA, Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations, in: Yale Journal of International Law 19 (1994) 327.

51 Art. 24 (6) of the PKO Law reads that, "[t]he use of small-sized weapons or arms under the provisions of the foregoing paragraphs shall not cause harm to persons, except for cases corresponding to the provisions of Articles 36 and 37 of the Penal Code (Law No. 45 of 1907)".

out that, “[the] use of the domestic law concept of legitimate individual defense to legitimize the use of arms by U.N. peacekeepers is fundamentally flawed given the international character of the peacekeepers and the inherently collective nature of their actions”.⁵² It seems that the unjustifiable limitation stems from confusion between the constitutional limitation and the operational limitation on the use of armed force. It is one thing to justify the despatch of armed troops under Article 9, and it is another to decide to what extent the use of weapons is allowed in the course of the operations. Once the despatch of military troops is justified in relation to Article 9, the manner in which Japanese contingents carry out the U.N. mandates given to them should be governed by the international standards of operation.

There is no doubt that it is desirable that Japan cooperate with U.N. peace operations by sending armed forces in a more robust manner, considering that the pacifism embodied in Article 9 was originally premised on the maintenance of international peace and security under an effective collective security mechanism of the U.N. The effective collective security mechanism was to be composed of military contingents provided by each State. Who on earth could justifiably seek for help under the collective security system without itself offering adequate military capabilities? Uncooperative attitude toward the U.N. peace operations in the name of Article 9 would actually be tantamount to betrayal of the spirit of Article 9. If Japan is going to seek for a permanent position in the U.N. Security Council, it will have to clarify this point in a way that it expresses the readiness on the part of Japan to contribute to more legitimate and effective U.N. peace operations serving for the purpose of maintaining international peace and security. It is also proposed, to that end, that Japan establish reserved military contingents specialised in implementing U.N. resolutions in an impartial manner in harmony with other national contingents, which are to be commanded only under the U.N. authority, if the Japanese Government is concerned with the spread of fear and suspicion inside as well as outside of Japan about the expansion of the SDF roles.

b) Activism of Japan's Participation

With an increase of Japanese SDF contingents' involvement in post-conflict areas for the purpose of providing humanitarian aid or logistic support over the last decade,⁵³ the inexorable activism has allowed Japan to authorise the dispatch of the SDF contingents even in the way that might have crossed the line of Article 9 restriction. Government's decisions to dispatch the SDF contingents to Iraq in 2003 would have had to be distinguished from its previous ones adopted pursuant to the U.N. Security Council resolu-

52 SHIBATA, *supra* note 50, 332-333.

53 The SDF contingents were dispatched for peace-keeping purposes to the Persian Gulf in 1991, to Cambodia in 1992, to Mozambique in 1993, to Zaire and Kenya in 1994, to the Golan Heights in 1996, to East Timor in 1999, to Afghanistan in 2001. See, SDF Dispatch Laws and Missions, in: The Japan Times (14 June 2003) available at <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030614b4.htm>> visited on 1 October 2004.

tions. Although it was based on the U.N. Security Council Resolution 1483,⁵⁴ Law Concerning the Special Measures on Humanitarian and Reconstruction Assistance in Iraq (hereinafter: Iraq Special Measures Law)⁵⁵ was enacted to provide the humanitarian and reconstruction assistance as well as the assistance to ensure security *on its own initiative* in an active manner.⁵⁶ Given the ambiguous and general nature of the appeals of humanitarian and reconstruction assistance made in the Security Council resolution,⁵⁷ it would be fair to say that it was Japan's own choice to respond to the appeal by sending the SDF contingents.

The activities based on the Iraq Special Measures Law were conditioned upon a consent of the foreign State, which in the case of Iraq, it goes on to state, "may be obtained from an organ governing Iraq in accordance with U.N. Security Council Resolution 1483". It was the Coalition Provisional Authority that the Security Council resolution called upon to "promote the welfare of the Iraqi people through the effective administration of the territory",⁵⁸ to which the international law of belligerent occupation was to be applied. By satisfying this condition, the Japanese SDF contingents were left with the ambiguous legal status in relation to the belligerent occupation law.⁵⁹ Given the fact that the Security Council resolution did not authorise the use of armed force against Iraq at any stage of the conflict, the real possibility could have arisen that the Japanese SDF contingents would be seen as they joined the occupying powers, which resorted to armed force as a means of settling an international dispute,⁶⁰ and thus crossed the line of Article 9 restriction, even if they did not take part in forefront combats.

Despite the significant implications of Japan's participation in the coalition military operation in Iraq from the international legal perspective, the Japanese concern was

54 U.N. Doc. S/Res/1483 (22 May 2003).

55 *Iraku ni okeru jindō fukkō shien katsudō oyobi anzen kakuho shien katsudō no jishū ni kansuru tokubetsu sochi-hō*, Law No. 137/2003; Engl. Transl.: M. HAYASHI, Translation: The Japanese Law concerning the Special Measures on Humanitarian and Reconstruction Assistance in Iraq: Translator's Introduction, in: *Pacific Rim Law & Policy Journal* 13 (2004) 587-609.

56 Iraq Special Measures Law, Art. 1.

57 It only appealed "to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and contribute to the conditions of stability and security in Iraq in accordance with this resolution" and called upon the members "to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure". U.N. Doc. S/Res/1483 (21 May 2003), paras. 1, 2.

58 *Ibid*, para. 4.

59 D.J. SCHEFFER, *Beyond Occupation Law*, in: *American Journal of International Law* 97 (2003) 846.

60 Indeed, the Japanese troops have been attacked for the reason that they are cooperating with the occupation of Iraq. See, *Iraqi Says SDF Targeted for Helping U.S.*, in: *The Japan Times* (30 September 2004) available at <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040930a4.htm>> visited on 30 September 2004.

deemed to be confined to the constitutional and security issues. The arguments made by the opposition parties as well as protesters were merely based on the constitutional and security reasons,⁶¹ which have failed in an attempt convincingly to expose the illegitimacy and illegality of its decisions. This event might have defined the moment at which Japan's policy on the SDF overseas activities stepped out of line, which Article 9 had aimed to prevent. Much of the policy was certainly due to political outcomes. However, it should also have been ascribed to the failure of ascertaining a legitimate scope of Article 9 restriction in light of international law of peace and security. No convincing argument could be made without understanding the rationale of Article 9 within the international legal context.

V. CONCLUSION

Japan has been bound by virtue of Article 9 to equip itself only with defensive forces in a very strict sense. It thus leads us to conclude that Article 9 restricts the scope of the right of self-defense in its exercise compared to that envisaged by any state under international law, though the scope is not as restrictive as to prohibit Japan from exercising the right of self-defense, individual or collective, under any circumstances. Japan has also refrained from making much commitment in the international scenes, in so far as military actions are concerned. It seems, however, that the legitimacy of overseas dispatch of the SDF contingents under the U.N. authority has gained wider recognition, though Japan has still – even unduly – restricted the opportunities that the SDF personnel could use their arms for the purpose of effective implementation of the mandates.

The Ambiguity inherent in Article 9 has, on the other hand, left room for the possibility of evading Article 9 restriction by explaining that the SDF is not involved in actual combats. It would not make sense, from the international legal point of view, to justify the overseas dispatch of the SDF on the basis of non-combat operations. As shown above, there has been real possibility that the SDF activities might well have crossed the line of Article 9 restriction in the excuse of non-combat operations. From the fear of this real possibility, some may argue that the development toward more active involvement of the SDF in military activities would significantly decrease the importance of Article 9.⁶² It may well be for this reason that there is an increasingly strong atmosphere toward the amendment of the Japanese constitution,⁶³ especially paragraph 2 of Article 9, in order presumably to strike a balance between the preserva-

61 Protesters Rally in Tokyo against Dispatch of Troops to Iraq, in: The Japan Times (26 January 2004) available at <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040126a2.htm>> visited on 1 October 2004.

62 See, e.g., GILLEY, *supra* note 3, 1704, 1716.

63 For the summary of various proposals of revision, see, G.D. HOOK / G. MCCORMACK, *Japan's Contested Constitution: Documents and Analysis* (London 2001) 34-40.

tion of the constitutional legitimacy of Article 9 and the practical necessity.⁶⁴ It would be wrong, however, to think that the amendment of Article 9 could solve all of the legal issues. Those issues are rather to be solved by legislation based on appropriate legal considerations in accordance with the purpose and the spirit of Article 9 to be shaped in the international legal context. An amendment of Article 9 cannot be a panacea for Japan's security issues.

There have always been interactions between municipal law and international law. The relationship between Article 9 and international law on the use of armed force is no exception, in which Article 9 has worked as a stopper for Japan's use of military forces. It has also played an important role for the preservation of the regional security environment of the Asia-Pacific region. This is what Article 9 was meant to be. It is for those reasons that Article 9 is worthwhile to be left intact, with more active involvement of the SDF contingents in military operations overseas. In view of the increasingly strong atmosphere toward the amendment of the Japanese Constitution, the people might decide to amend Article 9. It is hoped that the rationale of Article 9 will not be forgotten or lost, because this is the reason why Article 9 of the Japanese Constitution can find its own value in the world.

ZUSAMMENFASSUNG

Anlässlich der kontroversen Entsendung japanischer Selbstverteidigungstruppen in den Irak scheint Japan die richtige Gelegenheit zu ergreifen, seine berühmte Kriegsverzichtsvorschrift, Artikel 9 der Verfassung, zu überarbeiten. Die Mehrdeutigkeit, die Art. 9 inhärent ist, macht ihn möglicherweise ungeeignet für eine Überprüfung von Regierungsentscheidungen. Vielleicht hat sie auch dazu beigetragen, daß unerlaubte Militäraktionen außerhalb des Landes durchgeführt wurden. Der Untersuchung von Art. 9 sollte im Lichte des Völkerrechts viel Aufmerksamkeit gewidmet werden, weil Fragen der nationalen Verteidigung und Sicherheit notwendigerweise internationale Dimensionen sowohl im materiellen als auch im juristischen Sinne berühren. Eine Sichtweise aus völkerrechtlicher Perspektive wird in der Tat Licht auf den tieferen Grund von Art. 9 werfen, um den beabsichtigten Umfang der Beschränkung herauszufinden. Sie mag auch die Mehrdeutigkeit von Art. 9 bestätigen und ihm zugleich in einem modernen Kontext neue Geltung verschaffen.

64 It is reported that a Constitutional Research Panel of the Liberal Democratic Party is taking this line of amendment, leaving Article 9 (1) intact and eliminating Article 9 (2) to be replaced by a sentence recognising the existence of the SDF and the right of collective self-defense. See, LDP Panel Eyes Changes to Constitution Preamble, in: The Japan Times (21 April 2004) available at <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040421a2.htm>> visited on 21 April 2004.

Von diesem Standpunkt aus untersucht der Artikel zunächst, bis zu welchem Grad Art. 9 darauf zielt, den Gebrauch von Waffengewalt bei der Ausübung des Rechts auf Selbstverteidigung im Vergleich zum gerechtfertigten Bereich innerhalb des Völkerrechts zu beschränken. Obwohl das Prinzip der teleologischen Auslegung unvermeidlich einen gewissen Grad an militärischem Einsatz rechtfertigen würde, muß betont werden, daß Art. 9 bislang doch geholfen hat, Japans militärische Kapazitäten auf solche zum Zwecke der Selbstverteidigung zu beschränken. Angesichts der Tatsache, dass der Begriff der Selbstverteidigung in der aktuellen Praxis mehr und mehr ausgedehnt wurde, mag die tiefere Bedeutung des Art. 9 darin liegen, Japan daran zu hindern, dieses Recht (noch) extensiver auszulegen.

Der Beitrag zeigt ferner, daß Japan vor dem Hintergrund dieser Interpretation von Art. 9 vorsichtig mit dem Recht auf kollektive Selbstverteidigung umzugehen hat. Dies schließt ebenso Hintergrundaktionen im näheren Umfeld von Japan wie Handlungen ein, die über dasjenige hinausgehen, was in Unterstützung der US-geführten Militäroperation in Afghanistan unternommen wurde. Auf der anderen Seite hat die Legitimität der Entsendung von japanischen Selbstverteidigungskräften unter UN-Autorität diesen einen Ansehenszuwachs gebracht, obwohl die Gelegenheiten, bei denen die Truppen ihre Waffen zum Zwecke der effektiven Durchsetzung der Mandate einsetzen konnten, sehr beschränkt waren.

Die von Art. 9 gezogene Grenze dürfte jedoch überschritten worden sein, als die japanische Regierung beschloß, Selbstverteidigungstruppen in den Irak zu entsenden, und sich dabei auf den mehrdeutigen gefaßten Aufruf zu humanitärem Beistand und zur Wiederaufbauhilfe gemäß der UN-Sicherheitsratsresolution 1483 berief. Angesichts des immer aktiveren Einsatzes von japanischen Selbstverteidigungskräften in Überseemissionen spricht vieles dafür, Art. 9 als eine Schranke für den Einsatz von militärischen Kräften unverändert zu lassen.

(deutsche Übersetzung durch die Redaktion)