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Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions

Introduction

Throughout its post-war history, Japan has walked a legal tightrope between seemingly contradictory obligations imposed by its constitution and the Charter of the United Nations. This tension came to a head in 1990 when Japan agonized over the question of sending military troops to join U.N. forces in the Persian Gulf War. Despite an apparent conflict between domestic and international law, the ultimate course taken by Japan, contributing non-military assistance to the U.N. coalition,¹ successfully complied with legal obligations contained both in Japan's constitution and in the U.N. Charter.

Japan's "Peace Constitution" of 1947 [*Kenpō*] appears to preclude maintenance of military forces. Article 9 states in part: "[T]he 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. . . *land, sea, and air forces, as well as other war potential, will never be maintained.*"²

1. Japan pledged \$13 billion to the Gulf coalition, including \$11 billion in support for multinational forces and \$2 billion in economic assistance for countries affected by the Gulf War. PR NEWSWIRE, Jan.24, 1991, available in LEXIS, Nexis Library, Wires File. In April 1991, two months after fighting in the region had ended, Japan sent four minesweepers and two support ships to the Gulf to clear shipping lanes. Sam Jameson, *Japan to Send Ships to Gulf in Foreign Policy Reversal*, L.A. TIMES, Apr. 25, 1991, at A1. Though important as the first overseas non-training mission for Japan's military, this naval dispatch occurred during peacetime, outside a U.N. framework, and had political and economic as opposed to military objectives. *Id.* Thus, the constitutionality of Japanese military participation in U.N. enforcement activities remains unchanged. *But see infra* note 244.

2. KENPŌ [Constitution] art. 9 (Japan) (emphasis added). The English version of Japan's constitution cited herein is the official U.S. State Department version, DEPARTMENT OF STATE, THE CONSTITUTION OF JAPAN, Publication 2836, Far Eastern Series 22 (1947). Prior drafts of Japan's constitution cited *infra* are also official government translations.

Language differences complicate a strict textual analysis of a foreign constitution. While officials concurrently drafted Japan's constitution in both English and Japanese, making a textual analysis less problematic in this unique situation, difficulties

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This language served Japan well in the days of post-war reconstruction. During this period, Japan felt neither a need nor a desire to engage in war.

U.N. Charter obligations, which Japan agreed to fulfill³ when it became a U.N. Member in 1956,⁴ appear to require Japan to contribute armed forces to international peacekeeping efforts. Chapter VII of the U.N. Charter, specifically in Article 43,⁵ requires that “[a]ll Members . . . undertake to make available to the Security Council, on its call and in accordance with special agreements, *armed forces*, assistance and facilities . . . for the purpose of maintaining international peace and security.”⁶ When read in isolation from historical context and other relevant provisions, these passages from Japan’s constitution and the U.N. Charter seem difficult, if not impossible, for Japan to reconcile.

Concern over this conflict of duties emerged in Japan’s legislature, the Diet, as early as the 1946 debates on the new constitution.⁷ Some members believed that Article 9 should be revised to allow full U.N. par-

remain. For a scholarly study of linguistic and cultural aspects of the drafting of Japan’s constitution, including the intentional use of language ambiguities to make constitutional provisions acceptable to both sides, see KYOKO INOUE, *MACARTHUR’S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY IN ITS MAKING* (1991).

3. Language in the Charter requires acceptance of U.N. Charter obligations as a condition of Membership. U.N. CHARTER art. 4, ¶ 1.

4. *Roster of the United Nations (As of 31 March 1956)*, 1956 U.N.Y.B. 489, U.N. Sales No. 1957.I.9. The Security Council recommended Japan for Membership on December 12, 1956. *Admission of New Members*, in *id.* at 109, 114. The General Assembly unanimously voted to admit Japan on December 18, 1956. *Id.* at 110.

5. Chapter VII of the U.N. Charter, entitled “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” authorizes sanctions and describes methods of sanction enforcement. It includes Article 43. U.N. CHARTER ch. VII.

6. U.N. CHARTER art. 43, ¶ 1 (emphasis added).

7. In 1946, the Imperial Diet consisted of a lower House of Representatives, and an upper House of Peers. During World War II, the Diet became “an outright rubber stamp for the executive” and participated minimally in wartime decisions. Justin Williams, *The National Diet*, in 1 *POLITICAL REORIENTATION OF JAPAN* 145 (undated, but 1949) [hereinafter *National Diet*]. The new constitution later transformed the Diet into the preeminent body of state power, but during the interim debates on the constitution, the Diet was just beginning to emerge as an independent political force. On April 10, 1946, the first post-war general election for the House of Representatives was held, under occupational auspices. *Id.* at 147. This elected House of Representatives participated in the constitutional debate.

The 1946 House of Peers was comprised of Imperial family Members, Imperial nominees, and Members selected from among Japan’s highest taxpayers. *Id.* at 181. Academics were added to this elite body specifically to participate in discussions regarding the new constitution. *JAPANESE ASSOCIATION OF INTERNATIONAL LAW, JAPAN AND THE UNITED NATIONS* 15 (1958) [hereinafter *JAPAN AND THE U.N.*]. This House of Peers continued until March 31, 1947, *National Diet*, *supra*, at 181, and directly participated in ratifying the new constitution in the fall of 1946. See *infra* note 89 and accompanying text.

Japan’s current Diet retains a lower House of Representatives, but the upper house is now called the House of Councillors. *KENPō* art. 42. Both houses are now elected from the general population, but the lower house is generally considered more powerful. *THEODORE MCNELLY, POLITICS AND GOVERNMENT IN JAPAN* 141 (3rd ed. 1984). For a discussion of the legislative transformation from Imperial Diet to the current

participation.⁸ The official government position supported the firm renunciation language of Article 9 despite its potential impact on Japan's future role in the United Nations.⁹ Still others supported Article 9 with the understanding expressed by Yoshinari Abe, chairman of the House of Peers constitutional committee, that in light of Article 9 Japan would have to be exempted from the U.N. duty to provide armed forces.¹⁰

Prior to 1990, debates about Japan's legal duties were largely academic. Since Japan's admission to the United Nations in 1956, a Cold War-hampered Security Council had never united in acting under Chapter VII to enforce sanctions.¹¹ That changed in August 1990 when Iraq invaded Kuwait. In response to the Iraqi invasion, the U.N. Security Council passed several resolutions condemning the invasion and authorizing the use of force after January 15, 1991.¹² A revitalized Japan had to decide for the first time in its post-war history what role it would play in a United Nations military enforcement action.

Japan addressed this issue under the pressure of heightened international expectations. Japan's economic strength and dependence upon Persian Gulf oil seemed to suggest that Japan ought to contribute to the Gulf coalition in a meaningful way. The international community was less interested in constitutional restraints than in direct Japanese involvement in the region. Some commentators even suggested that Japan lacked a constitutional basis for not participating militarily.¹³

This Note analyzes Japan's legal obligations to the U.N. in military sanction enforcement. The analysis discusses the implications of Japan's unique constitution and uses the Persian Gulf War as an illustration. Part I briefly describes the U.N. response to Iraq's invasion of Kuwait and the pressure exerted upon Japan to contribute troops to the U.N. coalition. Part II addresses the constitutionality of Japan's sending troops abroad. As a starting point, Part II examines the origin of Japan's constitution, particularly Article 9, the provision specifically addressing

National Diet, see *National Diet*, *supra*, at 145-85; JUSTIN WILLIAMS, *JAPAN'S POLITICAL REVOLUTION UNDER MACARTHUR* 144-63 (1979).

8. Shigeru Nambara, President of Tokyo University, articulated this position. Nambara was one of many scholars added to Japan's House of Peers to contribute to the constitutional debate. *JAPAN AND THE U.N.*, *supra* note 7, at 16. For a concise discussion of the legislative debate surrounding Article 9 and its effect on future U.N. obligations, see *id.* at 14-18.

9. *Id.* at 16-17.

10. *Id.* at 18.

11. Samuel Pollack, *Self Doubts on Approaching Forty: The United Nations' Oldest and Only Collective Security Enforcement Army, The United Nations Command in Korea*, 6 *DICK. J. INT'L L.* 1, 9-10 (1987). INDAR RIKHYE ET AL., *THE THIN BLUE LINE, INTERNATIONAL PEACEKEEPING AND ITS FUTURE* 4 (1974). The Security Council's only prior invocation of Chapter VII sanctions occurred in 1950 during the Korean Conflict, six years prior to Japan's joining the U.N. Pollack, *supra*, at 8-9. For a discussion of Korea, see *infra* notes 205-15 and accompanying text.

12. E.g., S.C. Res. 660, U.N. SCOR, 2932d mtg., U.N. Doc. S/RES/660 (1990); S.C. Res. 678, U.N. SCOR 2963d mtg., U.N. Doc. S/RES/678 (1990).

13. See, e.g., Donald Hellmann, *Japan's Bogus Constitutional Excuses in the Gulf*, *WALL ST. J.*, Feb. 6, 1991, at A12.

the question of Japanese military activities. Part II next explores whether the original meaning of Article 9 has changed due to textual amendment, judicial interpretation, executive interpretation, or legislative interpretation. Finally, Part II examines the Japanese government's attempt to accommodate calls for Japanese troops in the war against Iraq by changing the interpretation of Article 9. Part III analyzes the obligations of Member States to enforce U.N. sanctions under Chapter VII of the U.N. Charter. This analysis considers the Korean War, the only prior U.N. sanction-enforcement effort. Part IV considers the question of whether Japan deserves to be a Member of the U.N. in light of its constitutional restraints. The Note concludes that Japanese participation in military enforcement activities is inconsistent with Japan's constitution. Further, Japan's non-military contributions to the anti-Iraq coalition in the Persian Gulf War satisfied Japan's U.N. legal obligations because Member States bear no legal duty under the Charter to contribute militarily to U.N. enforcement of sanctions.

I. The United Nation Coalition Against Iraq

A. Failure of the Economic Embargo

Iraq's August 2, 1990 invasion of Kuwait sparked an immediate and concerted response from the world community. The United Nations Security Council, acting under Chapter VII of the U.N. Charter, enacted a world-wide economic embargo against import and export of oil and other goods to and from Iraq and occupied Kuwait.¹⁴ Military troops, largely from the United States, but also from other U.N. Member States, went to Saudi Arabia for the short-term purpose of protecting the Saudis from the Iraqi threat and enforcing the economic embargo.¹⁵

When six months of economic sanctions failed to drive the Iraqi Army from occupied Kuwait, an increasingly impatient Security Council turned to more drastic measures. U.N. Security Council Resolution 678 authorized military troops assembled in the Persian Gulf region to use force if Iraq refused to pull out of Kuwait and to restore Kuwait's former government by January 15, 1991.¹⁶ Iraq refused; the Persian Gulf War began a day later.

B. An Invitation for Japan

The United States took the lead in building a U.N. coalition to effect Resolution 678 by soliciting military and financial support from U.N.

14. S.C. Res. 661, U.N. SCOR 2933d mtg., U.N. Doc. S/RES/661 (1990).

15. Although troops were deployed to the region weeks earlier, the first U.N. call for endorsement of the embargo against Iraq came on September 25 in Resolution 670. S.C. Res. 670, U.N. SCOR 2943d mtg., U.N. Doc. S/RES/670 (1990). Paragraph 7 of Resolution 670 "[c]alls upon all states to co-operate in taking such measures as may be necessary, consistent with international law . . . to ensure the effective implementation of the provisions of resolution 661 (1990) or the present resolution." *Id.* at 3.

16. S.C. Res. 678, U.N. SCOR 2963d mtg., U.N. Doc. S/RES/678 (1990).

Members worldwide, including Japan.¹⁷ The exact nature of the Bush Administration's request to Japan is unclear. Officially, the White House denied asking Japan to send troops to the Persian Gulf, stating that the question was an "internal matter" for the Japanese government to decide.¹⁸ Japanese newspapers, however, reported that President Bush telephoned Japanese Prime Minister Toshiki Kaifu specifically requesting the dispatch of Japanese troops to the Gulf.¹⁹ Furthermore, Assistant Secretary of State Richard H. Solomon sent a clear message to the Japanese government in testimony before the House Subcommittee on Asian and Pacific Affairs: "What is needed is not only [Japanese] financial support but personnel and transportation resources as well. We have been heartened by recent comments by Japanese government spokesmen that thousands of Japanese personnel may yet go to the Gulf in non-military roles."²⁰ During the following month, Japanese newspapers quoted the U.S. State Department: "[The United States] would welcome direct participation by Japanese personnel in a substantial and visible role in support of the multi-national effort."²¹ Based on these reports, the United States did exert pressure on Japan to send military troops to the region and forced Japan to confront the question of sending troops abroad.

II. The Constitutionality of Japan's Sending Troops Abroad

The language of Article 9 of the Japanese constitution [*Kenpō*] seems dispositive on the constitutional question of sending Japanese military troops to foreign countries:

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

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.²²

17. See, e.g., R. C. Longworth, *British Send 6,000 Troops to the Gulf*, CHI. TRIB., Sept. 15, 1990, at 13 (military contributions); *U.S. to Bill Allies on Gulf; Others Must Bear Share of Billions in Costs, Bush Says*, L.A. TIMES, Aug. 30, 1990, at P1 (financial contributions).

18. Irene Kwaii, *Japan's Kaifu Under Heated Attacks for Gulf Troop Plan*, CENTRAL NEWS AGENCY, Oct. 18, 1990, available in LEXIS, Nexis Library, Wires File (quoting statement by Roman Popadiuk, Deputy White House Press Secretary, in an October 18, 1990, press briefing). The language employed was somewhat ambiguous: "I don't think anyone has specifically requested the government of Japan to dispatch troops to the Persian Gulf." *Id.*

19. *U.S. Has Not Asked Japan to Send Troops to Persian Gulf*, REUTERS, Oct. 17, 1990, available in LEXIS, Nexis Library, Wires File. The Japanese newspapers quoted senior Japanese government officials as the source for this story.

20. Kwaii, *supra* note 18.

21. David Butts, *Japan Talks of Sending Volunteers to Gulf*, UPI, Nov. 9, 1990, available in LEXIS, Nexis Library, Wires File.

22. KENPŌ art. 9 (emphasis added).

Many factors influence the legal interpretation of provisions in Japan's constitution. Before concluding that sending troops abroad violates Article 9, these influencing factors must be addressed.

First, because Japan's constitution originated under the watchful eye of victorious U.S. occupational forces, its legitimacy may be suspect. Had the U.S. forced Japan to accept Article 9, formal revision or informal sidestepping of the provision would appear justified. The history of Article 9, however, strongly indicates both Japanese origin and popular acceptance of the Article, despite the occupational circumstances.²³

Second, legislative history influences the meaning of Article 9. The official government interpretation, upon which ratifying Diet members relied, did not allow Japanese military troops to exist, let alone allow their deployment abroad.²⁴

Third, Japan's constitutional provisions can be altered in a number of ways. Formal textual amendments or informal interpretations by Japan's judicial, executive, or legislative branches can change constitutional meaning.²⁵ In the absence of these types of changes, however, the original meaning of the constitutional language endures.

A. The Origin of Article 9

Upon Japan's unconditional surrender at the end of World War II, the occupational forces, led by General Douglas MacArthur, set out to reform and rebuild the conquered nation.²⁶ U.S. reformers outlined twin goals:

- a. To insure that Japan will not again become a menace to the United States or to the peace and security of the world.
- b. To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the ideals

23. See *infra* notes 26-61 and accompanying text.

24. See *infra* notes 86-87 and accompanying text.

25. See *infra* note 97 and accompanying text.

26. Of the many historical accounts concerning constitutional revision during the Allied occupation of Japan, the official government record is Alfred Hussey, *The New Constitution of Japan*, in GOVERNMENT SECTION OF GENERAL QUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN 82 (undated, but 1949) [hereinafter Hussey]. This account is found in a two-volume record, Volume One [hereinafter 1 POLITICAL REORIENTATION] containing discussions of various facets of the occupation with pages numbered 1-401. Volume Two [hereinafter 2 POLITICAL REORIENTATION] contains an exhaustive compilation of associated documents and is page numbered 402-1300.

For accounts by participants, see DOUGLAS MACARTHUR, REMINISCENCES 267-324 (1964); ALFRED OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 43-64 (1976); WILLIAMS, *supra* note 7, at 98-143; and Charles Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 POL. SCI. Q. 215 (1989). Other accounts include Robert Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980 (1956); Theodore McNelly, *The Japanese Constitution, Child of the Cold War*, 74 POL. SCI. Q. 176 (1959); and John Maki, *The Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN 3 (Dan F. Henderson ed., 1968).

and principles of the Charter of the United Nations.²⁷

Revision of Japan's Meiji Constitution²⁸ was essential to meet these goals. Further, MacArthur viewed revision of the Meiji Constitution as necessary for Japan to meet the requirements of the Potsdam Declaration.²⁹ In addition to the Potsdam Declaration, two other directives guided the process of constitutional revision; neither called for a Japanese renunciation of war. The first directive was a policy paper on Japan generated by the U.S. State-War-Navy Coordinating Committee.³⁰ In the second directive, Secretary of State Byrnes communicated instructions directly to George Atcheson, the top State Department official in Japan.³¹ Both official directives expressly contemplated a future military force in Japan, after post-war demilitarization.³²

Newly formed Japanese political parties also made public proposals for constitutional revision. The Progressive, Liberal, Social Democrat, and Communist Parties all made constitutional draft proposals in the early days of the occupation.³³ These political parties sought to attract voters as well as to influence political debate through their respective proposals. Like the official U.S. directives, each political party proposal omitted demilitarization and the renunciation of war.³⁴

Thus, the permanent demilitarization and war renunciation language of Article 9 came neither from Washington directives nor from internal Japanese political debate but from less official sources.

Prime Minister Shidehara responded to MacArthur's call for constitutional reform by commissioning a constitutional review committee chaired by Dr. Joji Matsumoto.³⁵ The resulting Matsumoto Committee

27. *United States Initial Post-Surrender Policy for Japan*, reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 423.

28. The Meiji Constitution, or "Constitution of the Empire of Japan," was promulgated in February, 1889. SHIN'ICHI FUJII, THE CONSTITUTION OF JAPAN 266 (1965). For a history of its development as Japan's first constitution, see *id.* The Meiji Constitution contained express provisions outlining the supremacy of Japan's Emperor and has been called Japan's Imperial Constitution in contrast to the post-World War II constitution wherein the Emperor is relegated to a status of symbolic head of state. *Id.* at 298; KENPŌ art. 1.

29. Kades, *supra* note 26, at 218. The Potsdam Declaration was the product of a July 1945 meeting in Potsdam, Germany between the heads of state from the United States, Great Britain, and China. The document outlined the terms for Japan's surrender and post-war expectations, including the democratization of Japan's political system. Japan had to meet the Declaration's conditions prior to the termination of post-war occupation. *Potsdam Declaration*, reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 413.

30. This directive, entitled "Reform of the Japanese Governmental System" and designated SWNCC-228, is discussed in Ward, *supra* note 26, at 989-90.

31. McNelly, *supra* note 26, at 179-80.

32. Both directives set forth civilian control of the military as a check against government sponsored militarism. Ward, *supra* note 26, at 990 (SWNCC-228); McNelly, *supra* note 26, at 179-80 (Byrnes directive).

33. Hussey, *supra* note 26, at 95-97.

34. *Id.* at 98.

35. *Id.*

draft³⁶ made only token changes to the Meiji Constitution.³⁷ Important for Article 9 purposes, however, the Matsumoto draft contained an express provision governing military troops.³⁸ This provision looked to the future and it was only to be utilized if Japan were allowed to rearm. The committee argued, "if Japan [is] permitted to join the United Nations Organization, the need for rearmament might actually arise in order that she may fulfill her obligations under its charter."³⁹ With an express provision governing the military, Japan could meet U.N. obligations without the necessity of a constitutional amendment. MacArthur found the Matsumoto draft unacceptable and rejected it.⁴⁰ Later drafts contained no express provision governing the military.

To clarify basic principles and to expedite constitutional revision, MacArthur authorized his own Government Section⁴¹ to draft a model constitution to guide future Japanese revision efforts.⁴² He outlined three basic concepts that he wanted included in the model.⁴³ One concept made the Emperor responsible to the will of the people, another ended Japan's feudal system, and the third became the predecessor to Article 9:

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.⁴⁴

At the time, it appeared that MacArthur had initiated this war renunciation provision. In later years, however, MacArthur wrote that Prime Minister Shidehara privately suggested the idea to him even

36. The Matsumoto draft was not a new document, but rather a set of proposed alterations to the Meiji Constitution. See FUJII, *supra* note 28, at 283-84. Instead of submitting a formal draft constitution, the committee simply provided a "Gist of the Revision of the Constitution" and a "General Explanation of the Constitutional Revision Drafted by the Government." Hussey, *supra* note 26, at 98.

37. For example, Article 3 of the Meiji Constitution, which read, "[t]he Emperor is sacred and inviolable" became "[t]he Emperor is supreme and inviolable." *Gist of the Revision of the Constitution*, art. 1, reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 617. Also, Meiji Constitution Article 11, which states "[t]he Emperor has the supreme command of the Army and Navy," was changed to, "[t]he Emperor has the supreme command of the armed forces." *Id.*

38. *Id.* See also *General Explanation of the Constitutional Revision Drafted by the Government*, reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 620-21 (explaining clauses dealing with the military).

39. *General Explanation of the Constitutional Revision Drafted by the Government*, reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 621.

40. See Hussey, *supra* note 26, at 102.

41. The Government Section was established in October 1945 as part of the occupational organization. Basically, the Government Section advised MacArthur on the restructuring of the Japanese government and suggested possible governmental reform. See Hussey, *supra* note 26, at 91; Kades, *supra* note 26, at 219.

42. Kades, *supra* note 26, at 223.

43. Hussey, *supra* note 26, at 102.

44. *Id.*

before the Matsumoto draft was completed.⁴⁵

Some critics question MacArthur's statement that Shidehara first suggested Article 9 and charge that if Shidehara really had formulated Article 9 he would have included it in the Matsumoto draft, or at least publicized the fact that he had authored it.⁴⁶ While Shidehara organized the Matsumoto Committee, the conservative Matsumoto dominated Committee activities.⁴⁷ Kenzo Takayanagi, distinguished Chairman of Japan's Commission on the Constitution,⁴⁸ studied the matter thoroughly and concluded that Article 9 originated with Shidehara. Takayanagi wrote:

Shidehara behaved as if Article 9 were proposed by MacArthur, although he never clearly said so. If he had said that the proposal was his and not MacArthur's, it might have been rejected by the Cabinet. Shidehara was diplomatic enough to know this. So Cabinet Members . . . thought that the proposal was made by MacArthur and not by Shidehara. After this [Cabinet] meeting, Shidehara told a number of his close friends that 'Article 9 did not come from abroad' and that it was his own proposal.⁴⁹

Circumstances surrounding the offering of MacArthur's constitutional model to Japanese leaders provide another common basis for the "forced-constitution" charge. When General Courtney Whitney, head of the occupational Government Section, offered the document to the Japanese Cabinet, he suggested that quick action on constitutional revision was necessary to avert danger to the Emperor system.⁵⁰ The Soviet Union, Britain and Australia, all members of the Far Eastern Commission (FEC),⁵¹ organized to oversee the occupation, wanted to try the

45. For MacArthur's description of his meeting with Shidehara, see MACARTHUR, *supra* note 26, at 302-03. Shidehara's motives were not without subtleties. It is possible that Shidehara offered the no-war clause to eliminate the specter of an Imperial military threat and thereby save the Emperor system. McNelly, *supra* note 26, at 185.

46. SUEYOSHI OHTANI, WHO IS TO BE TRIED? 72-73 (1978). Former Prime Minister Yoshida also believed Article 9 originated with MacArthur, not with Shidehara. SHICERU YOSHIDA, THE YOSHIDA MEMOIRS: THE STORY OF JAPAN IN CRISIS 137 (2d ed. 1973).

47. OHTANI, *supra* note 46, at 161.

48. The Commission on the Constitution was created in 1956 to examine the constitution and make amendment recommendations if necessary. Although the Commission made no recommendations for amendment, its seven-year study was an important evaluation of the constitution. For Takayanagi's account of the Commission's work, see Kenzo Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in THE CONSTITUTION OF JAPAN 71 (Dan F. Henderson ed., 1968).

49. *Id.* at 87.

50. Kades, *supra* note 26, at 228.

51. The Far Eastern Commission consisted of the eleven nations that had been at war with Japan. The Commission provided an international forum to discuss Japan's compliance with the Potsdam Declaration. The Commission also had power to review MacArthur's actions as Supreme Commander for the Allied Powers. Decisions were made by majority vote, with the U.S., Soviet Union, Britain, and China holding veto power over any decision. Kades, *supra* note 26, at 217-18.

Emperor on charges of war crimes.⁵² MacArthur felt that quick acceptance of a democratic constitution would preempt the newly organized FEC from getting too involved in the occupation, and thus preserve the Emperor system.⁵³ Matsumoto interpreted Whitney's message as a threat to the person, not the institution of the Emperor.⁵⁴ Japanese documentation of the meeting, however, records no such interpretation.⁵⁵ Striving for hasty reform, Whitney also threatened to go public with MacArthur's draft,⁵⁶ something the Japanese leadership wished to avoid for fear that the public would embrace its democratic principles more readily than those outlined in the soundly criticized Matsumoto draft.⁵⁷

Even if one interprets this pressure as forcing the constitution on Japan's post-war leadership it is apparent that not only MacArthur, but the Japanese public as well supported the document. A public-opinion poll taken by the newspaper *Mainichi Shimbun* in May, 1946, found that seventy percent of those polled supported Article 9 and the renunciation of war, while only twenty-eight percent opposed it.⁵⁸ Alfred Oppler, a participant in the occupational reforms, wrote: "One had only to read the newspapers and speak to the man on the street . . . to realize that there were powerful movements among the people of enthusiastic support of Occupation objectives."⁵⁹ Others have also documented public support for demilitarization and for constitutional reform.⁶⁰

In summary, the seeds of Article 9 and the water that nourished them were Japanese, despite the dominant presence of U.S. occupational planters and tillers. The pacifist language of Article 9 was sug-

52. See McNelly, *supra* note 26, at 187; D. C. S. Sissons, *The Pacifist Clause of the Japanese Constitution*, 37 INT'L AFF. 45, 47 (1961).

53. McNelly, *supra* note 26, at 188. In a meeting with Chief Cabinet Secretary Wataru Narahashi, Kades and Hussey from the Government Section expressed the opinion that "it was absolutely necessary that the Japanese government forestall a Far Eastern Commission draft by sponsoring a constitution sufficiently drastic that the FEC could make no objections to it." *Id.* at 187-88. In light of the FEC's power to review MacArthur's actions as Supreme Commander, preemption of FEC involvement in the occupation was probably aimed at preserving more than just the Emperor system.

54. THEODORE McNELLY, *CONTEMPORARY GOVERNMENT OF JAPAN* 41 (1963).

55. Two Japanese officials who were present at the meeting recorded summaries of Whitney's remarks; neither mentioned a personal threat to the Emperor. Kades, *supra* note 26, at 229-30.

56. See *id.* at 229.

57. Kades recorded public reaction to the Matsumoto Draft: "A storm of protest followed the publication of the [Matsumoto Draft] because of the superficial changes in the Meiji Constitution. A virtual flood of unfavorable editorials, letters to the editor, and press releases of opposition political parties engulfed the Cabinet . . ." *Id.* at 222.

58. MAINICHI SHIMBUN, May 27, 1946, at 2.

59. OPPLER, *supra* note 26, at 47.

60. See Maki, *supra* note 26, at 13-14. During the constitutional debate in the Diet, Tetsu Katayama expressed Socialist Party support for the new constitution largely because of Article 9, which "has by no means been given or dictated from outside but is an expression of a strong current of thought which has been running in the hearts of the Japanese people." Kades, *supra* note 26, at 242.

gested by Prime Minister Shidehara, not General MacArthur. Further, the Japanese public enthusiastically supported Article 9. Even under the cloud of foreign occupation, the overwhelmingly one-sided constitutional vote in the newly elected House of Representatives is impressive.⁶¹ This public support, combined with the likelihood that Shidehara suggested the idea behind Article 9, make the origin of the provision appear to be Japanese.

B. Legislative History of Article 9

The various revisions of Article 9 provide insight into its framers' original intent. As the whole constitution of Japan went through seven revisions between MacArthur's notes and the final version adopted by the Diet, American and Japanese framers made two major changes of Article 9.

1. *Deletion of MacArthur's Ban on Self-Defense*

Once MacArthur asked for a model constitution, the Government Section immediately organized a Steering Committee composed of Commander Alfred R. Hussey, Colonel Charles L. Kades, and Lieutenant Colonel Milo E. Rowell to oversee the work.⁶² The Steering Committee coordinated the work of seven Government Section committees, each addressing separate portions of the model constitution: civil rights, the judiciary, the executive, the legislature, local government, finance, and the Emperor.⁶³ Of the remaining areas not addressed by committees, Hussey drafted the preamble and Kades worked on the section that became Article 9.⁶⁴

Colonel Kades, who reworked MacArthur's notes, made minor changes of terminology in Article 9, and a major change regarding self-defense. MacArthur had included the phrase "even for preserving its own security" behind the renunciation of war and the use of force.⁶⁵ Kades removed the phrase because he felt it violated Japan's inherent right to self-defense.⁶⁶ Thus, the first revision of Article 9 deleted explicit language that would have constitutionally prevented military self-defense by Japan.⁶⁷ This first major change undercuts the absolute

61. The vote was 421-8. Hussey, *supra* note 26, at 111. See *infra* note 89 and accompanying text. But see Ward, *supra* note 26, at 1005 (one-sided vote is misleading).

62. Kades, *supra* note 26, at 225. See also Hussey, *supra* note 26, at 102 (listing the members' full names and rank).

63. Kades, *supra* note 26, at 225.

64. *Id.* at 226.

65. See *supra* note 44 and accompanying text.

66. Kades later wrote: "I believed it was unrealistic to ban a nation from exercising its inherent right of self-preservation." Kades, *supra* note 26, at 236.

67. Article 9 in the Government Section draft read:

War, as a sovereign right of the nation, and the threat or use of force, is forever abolished as a means of settling disputes with other nations.

“will never be maintained” language of the ratified Article 9, and opens the door for self-defense forces.

Article 9 was in this Government Section form when Brigadier General Whitney presented the model draft to Japanese leaders in the Cabinet meeting described above.⁶⁸ After accepting the basic tenets of the draft, members of the Shidehara Cabinet drafted a Japanese version and then met with Government Section personnel to reach a compromise proposal to submit to the Japanese public.⁶⁹ The compromise draft made minor changes, selecting the term “renounced” instead of “abolished” to refer to Japan’s right to wage war.⁷⁰ MacArthur’s notes had included both terms, but the Government Section draft opted for “abolished.”⁷¹ Also, the maintenance-of-forces clause was severed from the right of belligerency, and while the latter remained unrecognized, the former was simply unauthorized.⁷² The changing from war “abolished” to war “renounced” and from troops “not . . . recognized” to “[not] authorized” suggests a softening of the anti-war, anti-troops message of Article 9, but apparently these changes were considered sufficiently minor as to remain consistent with MacArthur’s original guidelines.

2. *The Ashida Amendment*

After two more government draft revisions, neither of which affected Article 9,⁷³ the constitution went to the Diet, which made the second major change to Article 9. In the House of Representatives, Hitoshi Ashida, chairman of the House special committee on the constitution, added two introductory phrases to the House version of Article 9, one to each paragraph.⁷⁴ After the changes, Paragraph 1 read: “Aspiring sincerely to an international peace based on justice and order, the Japanese people, forever, renounce war. . .” Paragraph 2 began: “For the above purpose. . .”⁷⁵

The maintenance of land, sea, and air forces, as well as other war potential, and the right of belligerency of the state will not be recognized.

First Government Draft of Constitution, reprinted in 2 POLITICAL REORIENTATION, supra note 26, at 625. Compare supra notes 41-44 and accompanying text (MacArthur draft).

68. See *supra* notes 50, 54-57 and accompanying text.

69. Hussey, *supra* note 26, at 107.

70. *Second Government Draft of Constitution (Cabinet Draft), reprinted in 2 POLITICAL REORIENTATION, supra note 26, at 631.*

71. See *supra* note 67.

72. *Second Government Draft of Constitution (Cabinet Draft), reprinted in 2 POLITICAL REORIENTATION, supra note 26, at 631.*

73. See *Third Government Draft of Constitution, reprinted in 2 POLITICAL REORIENTATION, supra note 26, at 637; Fourth Government Draft of Constitution, reprinted in 2 POLITICAL REORIENTATION, supra note 26, at 643.*

74. Kades, *supra* note 26, at 236.

75. The full text of Article 9, as adopted by the House of Representatives, now read:

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

These two introductory phrases may indicate that Article 9 is not as restrictive as it appears. Ashida's vague terms suggest that troops may never be maintained "for the above purpose" of "war" and "the threat or use of force, as a means of settling disputes with other nations,"⁷⁶ but could be allowed for other purposes. In this sense, troops would be banned only from offensive activities, but not from self-defense or U.N. international sanction actions.⁷⁷ In 1953, Ashida argued that this language of the constitution allowed the creation of Japanese military troops for use in "national self-defense and international sanction."⁷⁸

Ashida's interpretation was not unappreciated by members of the Government Section. Colonel Kades wrote that he interpreted Ashida's amendment to allow future troops for U.N. participation as well as for self-defense, because he had already deleted the "even for preserving its own security" language from MacArthur's original notes.⁷⁹ Consequently, self-defense was already recognized as a sovereign right, and any expansion of that right had to concern U.N. participation. Furthermore, Kades felt that the Ashida amendment was calculated to address concerns held by leading Cabinet members that Article 9 could prevent Japan's admission to the U.N.⁸⁰ The FEC also believed that the Ashida amendment permitted rearmament, and responded by calling for a guarantee that only civilians would occupy Cabinet offices, thus assuring civilian control over a future military.⁸¹

While some outside observers may have realized the implications of Ashida's amendment, it is doubtful that the Japanese legislators who voted for the new constitution either knew of or supported Ashida's original intent. When Ashida argued in 1953 that he purposefully changed Article 9 to allow a future interpretation permitting self-defense or international sanction, commentators called him a "turn-coat" who had changed his interpretation supporting the official govern-

For the above purpose, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Draft of Japanese Constitution (As amended by the House of Representatives), reprinted in 2 POLITICAL REORIENTATION, *supra* note 26, at 649.

76. *Id.*

77. This argument assumes that the Article 9 language referring to war and the settling of international disputes applies only to wars involving *Japan* and the settling of *Japanese* disputes with other nations, as opposed to settling international disputes handled by the U.N. Otherwise, the use of U.N. military sanctions would be clearly unconstitutional and Ashida's contention to the contrary, *infra* note 78 and accompanying text, would be wrong. Therefore, the assumption that Article 9 applies only to Japanese disputes is implicit in this argument.

78. Takayanagi, *supra* note 48, at 84.

79. Kades, *supra* note 26, at 236-37.

80. *Id.* The concerned leaders included such prominent figures as former Prime Minister Shidehara, Prime Minister Yoshida (who replaced Shidehara as a result of Japan's first post-war election in May 1946), Matsumoto, and Tokujiro Kanamori, the state minister in charge of giving official constitutional interpretations. *Id.* at 237. See also Hussey, *supra* note 26, at 110 (Yoshida election).

81. Kades, *supra* note 26, at 237-38.

ment position that Article 9 banned troops for any purpose.⁸² Takayanagi argued this “turncoat” charge was refuted by a 1946 pamphlet in which Ashida’s view of Article 9 differed from the government’s.⁸³ Significantly, however, his 1946 published view did not include his later utilization of Article 9, paragraph 2 as a limiting tool.⁸⁴ Later, Ashida admitted to the Commission on the Constitution that he did not tell the Diet of his Article 9 intentions, fearing that if they became known the Americans would oppose his amendment.⁸⁵

In contrast to Ashida’s secret intent, the Cabinet, which introduced and sponsored the new constitution, read Article 9 differently. Prime Minister Yoshida, while arguing in support of Article 9, clearly renounced the use of Japanese troops even for self-defense:

Of late years most wars have been waged in the name of self-defense. This is the case of the Manchurian Incident, and so is the War of Greater East Asia. The suspicion concerning Japan today is that she is a warlike nation, and there is no knowing when she may rearm herself, wage a war of reprisal and threaten the peace of the world I think that the first thing we should do today is to set right this misunderstanding.⁸⁶

Takayanagi also reported that when he inquired into the meaning of Article 9 during the constitutional debate, he was told by government spokesman Tokujiro Kanamori that “the official interpretation was that Japan retained a right of national self-defense in international law, but by virtue of the second paragraph [of Article 9], she could neither wage war nor maintain an armed force—even for purposes of national self-defense.”⁸⁷ Although Diet members who voted for Article 9 knew of the official government interpretation, they were probably unaware of Ashida’s interpretation. Therefore, ratifying votes for Article 9 must be read to support the advertised interpretation of the time, and not the subtle Ashida Amendment view.

3. Final Ratification

Both houses of the Diet promptly adopted the constitution in its final

82. Takayanagi, *supra* note 48, at 84.

83. *Id.*

84. *Id.*

85. Sissons, *supra* note 52, at 48. The Americans (at least Col. Kades) and the FEC realized the possibilities of the Ashida Amendment, and the latter acted to limit those possibilities. See *supra* notes 79-81 and accompanying text. Therefore, either Ashida was unaware of the U.S. and FEC recognition and approval of his amendment, or his silence was aimed at a different audience: the Diet and the Japanese public. On the heels of defeat in World War II, it is possible that many members of the Diet would have opposed the Ashida Amendment had they known its true purpose of constitutionally allowing future rearmament.

86. Kades, *supra* note 26, at 237. In support of Yoshida’s concern about misuse of self-defense wars, Kades notes that General Tojo, who was both Prime Minister and Army Minister during World War II, testified at his war crimes trial that Japanese wartime efforts, including the bombing of Pearl Harbor, were not aggressive acts but self-defense. *Id.*

87. Takayanagi, *supra* note 48, at 83.

form⁸⁸ by near unanimous margins.⁸⁹ Although this wide margin of victory in both houses suggests almost universal acceptance of the document, these votes were taken while U.S. troops still occupied Japan. Oppler noted that one participant felt more members of the House of Peers wanted to vote against the constitution, but voted for it because they viewed adoption as the quickest way to end the occupation.⁹⁰ Clearly, Japan's elite, including the post-surrender Cabinet and House of Peers, were less than enthusiastic about seeing Japan's traditional government system dismantled as democracy swept in.⁹¹ Popular support was strong, however, as exhibited by the vote in the democratically elected House of Representatives. The endurance of the constitution in its adopted form, even after the occupation, further demonstrates continued popular support.

The Imperial Privy Council, still under the Emperor's control prior to adoption of the new constitution, debated the revised constitution and approved it on October 29, 1946.⁹² On November 3, 1946, the Emperor released the following Imperial Rescript:

I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments⁹³ of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decisions of the Imperial Diet made in accordance with Article 73 of the said Constitution.⁹⁴

On May 3, 1947, exactly six months after the Emperor's announcement, the new constitution of Japan took effect,⁹⁵ carrying with it not only the Emperor's endorsement but, more importantly, the overwhelming support of the most representative and responsive legislature in Japan's

88. Minor changes were made by the House of Peers leaving Article 9 as it now stands. *KENPŌ* art. 9.

89. On August 24, 1946, the House of Representatives adopted the constitution by a vote of 421 to eight. One month later, the House of Peers voted 298 to two in favor of adoption. Minor changes by the House of Peers required a second vote by the House of Representatives on October 7, 1946, recorded as 342 to five for adoption. Hussey, *supra* note 26, at 1. Maki has elsewhere noted that careful scholarship has been unable officially to verify these voting statistics. "There was apparently no roll call vote. The two negative votes in the House of Peers were apparently attributed to the two members who spoke against the draft; the five in the lower house to members . . . who stated that they voted negatively." Maki, *supra* note 26, at 9 n.8.

90. The participant suggested that this sentiment was held by members in both houses, but Oppler felt it only applied to the House of Peers, and not to the newly elected House of Representatives. OPPLER, *supra* note 26, at 48-49.

91. See Ward, *supra* note 26, at 1005 ("In the House of Peers in particular one frequently detects a distinct preference for many of the institutions and practices of the Meiji Constitution.")

92. Hussey, *supra* note 26, at 111.

93. The New Constitution was passed as an amendment to the Meiji Constitution, but for all intents and purposes completely replaced it. See *id.* at 113. For a review of the sweeping changes implemented by the New Constitution, see *id.* at 113-18.

94. *Imperial Rescript*, 2 POLITICAL REORIENTATION, *supra* note 26, at 670.

95. Hussey, *supra* note 26, at 1.

history.⁹⁶

C. Changing the Meaning of Article 9

If Article 9, when adopted, did not allow even the existence of Japanese troops, foreign deployment of military troops would now be unconstitutional absent a subsequent change in the meaning of Article 9. Constitutional change can occur in Japan in four ways:

One is by ordinary legislation, in which the Diet adapts and applies the constitution to changing conditions. Another is by judicial interpretation of the constitution, whereby the meaning of the constitution is modified in a way similar to the way in which the Constitution of the United States is changed. A third way is by textually amending the constitution. A fourth way is by the government's interpretations of its own powers, as when the government decided it could dissolve the lower house, even though it did not have a vote of no confidence.⁹⁷

The creation of Japan's military, the Self-Defense Forces (SDF) exemplifies how constitutional change can occur in Japan without textual amendment. The existence of military troops and machinery, even for defensive purposes, violates the clear language of Article 9 and its interpretation when adopted.⁹⁸ The government's voluntary abandonment of its inherent right to self-defense in 1946 essentially left Japan with no troops, even for self-defense purposes. Yet, by the early 1950's, the government had changed its position, with MacArthur's blessing,⁹⁹ and decided that the constitution did not prevent war potential for pure self-defense.¹⁰⁰ With this new interpretation, the government proceeded to create the SDF.¹⁰¹

96. *National Diet*, *supra* note 7, at 147.

97. Theodore McNelly, *Constitution and Law Reform in Postwar Japan* (presentation at MacArthur Memorial Seminar, November 6-7, 1975) in MACARTHUR MEMORIAL LIBRARY AND ARCHIVES, *THE OCCUPATION OF JAPAN: THE PROCEEDINGS OF A SEMINAR ON THE OCCUPATION OF JAPAN AND ITS LEGACY TO THE POSTWAR WORLD* 2, 10 (1975).

98. *See supra* notes 86-87 and accompanying text.

99. MacArthur's position had also changed between 1946 and 1950. In 1946, he announced to the Japanese people that through Article 9 "Japan surrenders rights inherent in her own sovereignty and renders her future security and very survival subject to the good faith and justice of the peace loving peoples of the world." *General MacArthur's Announcement Concerning the Proposed New Constitution for Japan*, 6 March 1946, reprinted in 2 *POLITICAL REORIENTATION*, *supra* note 26, at 657.

With the Korean War looming, MacArthur's 1950 New Year's address to the Japanese people had a different tone: "Article 9 is based upon the highest of moral ideals, but by no sophistry of reasoning can it be interpreted as complete negation of the inalienable right of self-defense against unprovoked attack." MACARTHUR, *supra* note 26, at 304. *See also* OHTANI, *supra* note 46, at 182 (identification of MacArthur's speech as 1950 New Year's speech).

100. Prime Minister Yoshida's 1952 expression to this effect is found in Sissons, *supra* note 52, at 52: "It was on 6 March 1952 in the discussions on the Budget that Mr.[.] Yoshida made his famous 'slip of the tongue.' In reply to questioners he said that what the constitution prohibited was war potential as means of settling international disputes; it did not prohibit war potential for self-defense."

101. On June 8, 1950, MacArthur wrote to Prime Minister Yoshida calling for the creation of a 75,000 strong "Police Reserve." OHTANI, *supra* note 46, at 13, 181.

Approval of all three branches of government was necessary to create the SDF. First, the executive branch changed its position regarding the meaning of Article 9 as it applied to self-defense.¹⁰² Second, the Diet legislatively approved the measure by passing the SDF law in 1954.¹⁰³ Finally, Japan's Supreme Court has repeatedly dodged and implicitly rejected challenges that the SDF is unconstitutional.¹⁰⁴ Thus, SDF constitutionality relies not on vague inferences about self-defense from the Ashida Amendment but rather is supported by Japan's executive policy, legislative action, and judicial review. Through this process of acceptance, the constitutionality of the SDF has been established with a practical effect resembling a constitutional amendment.¹⁰⁵

Extending the right of self-defense to include the sending of Japanese troops abroad must also find support either in textual amendment or alteration by Japan's three branches of government. In the absence of such changes, foreign SDF deployment is unconstitutional.

1. *Textual Amendment*

The first method of changing the constitution is through textual amendment. Since Japan's constitution has never been formally amended, the text of Article 9 remains as it was in 1947. The renunciation-of-war clause remains controversial, however, and has played a central role in the movement to revise the constitution.¹⁰⁶ The most organized revision attempt occurred in 1956 when the Diet created the Commission on the Constitution.¹⁰⁷ Chaired by Kenzo Takayanagi, the Commission examined the constitution to determine problems and to suggest revisions.¹⁰⁸ Despite the majority of revisionists on the Commission, Chairman Takayanagi guided the discussions evenhandedly, and ultimately the Commission made no recommendations for revision but simply published all expressed views.¹⁰⁹ Consequently, the expected constitutional

One month later, MacArthur authorized an additional 100,000 troops to be added to the force. MACARTHUR, *supra* note 26, at 337. From this beginning, the force evolved into the "Security Guards" on October 15, 1952, and then the "Self-Defense Forces" on June 1, 1954. OHTANI, *supra* note 46, at 181.

102. See *supra* note 100. Compare Takayanagi, *supra* note 48, at 83 (the official government interpretation of Article 9 during the constitutional debates).

103. Jieitai ho, Law No. 165 of 1954.

104. See *infra* notes 116-26 and accompanying text.

105. The major difference, of course, is the permanence of the change. A constitutional amendment allowing the SDF could only be abandoned via the passing of another amendment. In contrast, the present sanctioning of the SDF is more tenuous and could be reversed by a subsequent court or legislature without constitutional amendment. Otherwise, the executive, legislative, and judicial acceptance of the SDF are functionally equivalent to allowing its existence.

106. For an excellent discussion of the history and rationale of Japan's revisionist movement, see H. Fukui, *Twenty Years of Revision*, in THE CONSTITUTION OF JAPAN 41 (Dan F. Henderson ed., 1968).

107. Takayanagi, *supra* note 48, at 71.

108. *Id.*

109. Dan F. Henderson, *Perspectives on the Japanese Constitution After Twenty Years*, in THE CONSTITUTION OF JAPAN xi-xii & n.2 (Dan F. Henderson ed., 1968) (Henderson's introduction to the collected essays).

revision never materialized, and experts characterize future amendment as “unlikely.”¹¹⁰

2. *Judicial Interpretation: The Case Law of Article 9*

Japan’s Supreme Court has addressed Article 9 in only a handful of cases, none of which has decided the issue of sending troops abroad. While the Supreme Court has never squarely faced the constitutionality of foreign deployment of troops, other Article 9 cases may support an interpretation allowing foreign deployment. Article 9 cases have reached the Supreme Court in two contexts: challenges to U.S.-Japanese defense treaties and challenges to the SDF. In each case, the Supreme Court has upheld defense treaties and allowed continued SDF existence. Analysis of the various rationales behind these decisions helps explain why the SDF is constitutional, while sending troops abroad is not.

a. Constitutionality of Defense Treaties

Sunakawa is the landmark case in the context of defense treaty challenges.¹¹¹ In *Sunakawa*, Supreme Court dicta recognized the inherent right to self-defense as compatible with Article 9,¹¹² and thereby provided the initial impetus behind later arguments that the SDF is constitutional.

In the 1959 *Sunakawa* decision, seven Japanese protesters were arrested for trespassing on a U.S. military base while protesting the extension of an air base runway. Since the Japan-U.S. security agreement justifying the base contained harsher trespass penalties than the common criminal code, the defendants had standing to challenge the treaty’s constitutionality because of its adverse impact on them. The trial court found the defendants not guilty because the security treaty with the United States was unconstitutional under Article 9’s prohibition against maintaining “war potential.”¹¹³ The Supreme Court unanimously reversed, holding that U.S. forces under the security treaty were not under Japanese control and therefore did not violate the ban on Japanese war potential.¹¹⁴ In dicta, the court described Japan’s right to self-defense:

110. Lawrence W. Beer, *Japan’s Constitutional System and Its Judicial Interpretation*, 17 *LAW IN JAPAN* 7, 13 (1984).

111. 13 Keishū 3225 (Judgment of Dec. 16, 1959, in the Saikosai, Japan’s Supreme Court). An English translation appears in JOHN M. MAKI, *COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60*, 298 (1964). Helpful commentaries include Alfred C. Oppler, *The Sunakawa Case - Its Legal and Political Implications*, 76 *POL. SCI. Q.* 241 (1961); Hideo Wada, *Decisions Under Article 9 of the Constitution - The Sunakawa, Eniwa and Naganuma Decisions*, 9 *LAW IN JAPAN* 117, 120-23 (1976).

112. See *infra* note 115 and accompanying text.

113. *Japan v. Sakata*, (Tokyo Dt. Ct.) Judgment of Mar. 30, 1959, 1 Kokeishū 776. This trial court decision is discussed in Wada, *supra* note 111, at 119-20.

114. Judgment of Dec. 16, 1959, Saikosai (Supreme Court), 13 Keishū 3225 (Japan). See also MAKI, *supra* note 111, at 303-04 (English version).

[T]he said article renounces what is termed therein war and prohibits the maintenance of what is termed war potential; naturally, the above in no way denies the inherent right of self-defense, which our country possesses as a sovereign nation, and the pacifism of our Constitution has never provided for either defenselessness or nonresistance.¹¹⁵

This expression of support for Japan's inherent right to self-defense as compatible with Article 9 became central to the argument for SDF constitutionality.

b. SDF Constitutionality

The Japanese Supreme Court, in addressing SDF cases, has avoided explicit recognition of SDF constitutionality while allowing the military's continued existence. Japanese courts have most often decided these cases on legal technicalities, avoiding a direct ruling on the hard issue of SDF constitutionality.

The first SDF challenge, the *Suzuki* decision,¹¹⁶ was decided before Japan's military was even known as the SDF. In 1952, the secretary-general of Japan's Social Democratic Party, Mosaburo Suzuki, challenged the creation of the "Police Reserve" as unconstitutional under the "war potential" provision of Article 9. In its first opportunity to rule on the constitutionality of Japanese troops, Japan's Supreme Court unanimously avoided the Article 9 issue and dismissed the case on the grounds that no concrete legal dispute existed.¹¹⁷

The *Eniwa* case¹¹⁸ was the first post-*Sunakawa* case to challenge the constitutionality of the SDF and, predictably, the prosecution argued that Japan's inherent right to self-defense, implied by *Sunakawa*, extended to the SDF.¹¹⁹ In *Eniwa*, two ranchers cut the telephone wires leading to a neighboring SDF base in order to disrupt training missions and thereby reduce the associated noise. They were charged with damaging military equipment in violation of the SDF law. The Sapporo District Court refused to extend the *Sunakawa* dicta to the SDF, and instead dismissed the case on the grounds that the ranchers' act did not constitute destruction of military property.¹²⁰ The case was not appealed.

In 1969, a final challenge to the SDF came in the *Naganuma Nike* case.¹²¹ Residents from Naganuma fought a proposal to reclassify a local forest preserve to allow the Air SDF to construct a Nike missile site.

115. MAKI, *supra* note 111, at 303.

116. Judgment of Oct. 8, 1952, Saikosai (Supreme Court), 6 Minshū 783. An English version of *Suzuki* is found in MAKI, *supra* note 111, at 362.

117. MAKI, *supra* note 111, at 364.

118. Judgment of Mar. 29, 1967, Sapporo Chisai (Sapporo District Court), 9 Kokeishū 359. The *Eniwa* case is discussed in Wada, *supra* note 111, at 123-25.

119. Wada, *supra* note 111, at 124.

120. *Id.* at 123-24.

121. Judgment of September 7, 1973, Sapporo Chisai (Sapporo District Court), HANJI (No. 712) 24. The information used in this Note on the *Naganuma Nike* case comes from Robert L. Seymour, *Japan's Self-Defense: The Naganuma Case and Its Implications*, 47 PAC. AFF. 421 (1974-5), and Wada, *supra* note 111, at 125-27.

The residents argued that the status of the forest could only be changed for the public good, and since the SDF was unconstitutional, creation of an SDF missile site could not be in the public interest. They also argued that destruction of the forest would cause ecological harm, including flooding. The trial judge held for the residents and enjoined missile site construction.¹²² On appeal, the Sapporo High Court reversed the trial court on the basis of government proposals to remedy potential ecological harm adequately and allowed the government to proceed on the missile site.¹²³ The High Court's failure to rule on the constitutionality of SDF left it open for consideration by the trial court on remand. Four years and twenty-seven hearings later (by this time, the missile site had been completed) the trial judge ruled the SDF unconstitutional.¹²⁴

This September 7, 1973 decision was the first judicial determination that the SDF was unconstitutional. The government immediately appealed the case to the Sapporo High Court, which in 1976 quashed the trial court ruling and dismissed the action because the plaintiffs lacked standing.¹²⁵ In 1982, The Supreme Court sustained the High Court's decision,¹²⁶ thereby vacating the only Japanese court decision to find the SDF unconstitutional.

Analysis of the Japanese Supreme Court's treatment of Article 9 cases suggests two conclusions. First, the court's refusal to strike down the SDF as unconstitutional suggests tacit approval of the SDF as permissible under the court's notion of Japan's inherent right to self-defense.¹²⁷ The practical effect of the court's inaction is to allow continued SDF existence. Second, the court's reluctance to hold the SDF explicitly *constitutional* suggests judicial discomfort about doing so in light of clearly contrary constitutional language. The court apparently prefers that the other branches of government initiate Article 9 alterations. As long as the political response of the electorate is generally favorable, the court is willing to defer to the Cabinet and Diet.¹²⁸

Japan's strong policy of judicial deference is due, in part, to two important factors. First, Supreme Court judges are appointed by the

122. Seymour, *supra* note 121, at 426-27.

123. *Id.* at 427.

124. *Id.* at 428.

125. Theodore McNelly, *The Renunciation of War in the Japanese Constitution*, 13 *ARMED FORCES & SOC'Y* 81, 84 (1986).

126. *Id.*

127. Admittedly, this point is debatable—the court may have decided each SDF case on technical grounds, not out of a tacit support for the SDF, but on legitimate jurisprudential principles compatible with the avoidance of constitutional issues. If the court truly believed, however, that the SDF was indeed unconstitutional, it seems improbable that it would continue to allow its existence by not striking it down.

128. In the *Sunakawa* opinion, the court refused to rule the treaty with the United States unconstitutional, but rather felt this was "a matter that must be entrusted to the decision of the cabinet, which possesses the power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people." MAKI, *supra* note 111, at 306 (emphasis added).

Cabinet.¹²⁹ Since the Liberal Democratic Party has dominated the executive branch since the end of World War II, it is reasonable to believe that successive cabinets have appointed judges who agree with the philosophy of the majority party. This may explain why the Court has rarely found Cabinet-sponsored legislation enacted by the Diet unconstitutional.¹³⁰ Also, while judges are to be “independent in the exercise of their conscience,”¹³¹ Japanese Supreme Court judges are subject to decennial reviews by the electorate.¹³² If the majority of the voters favor a judge's dismissal, he is dismissed.¹³³

In light of these constitutional provisions, it is not surprising that Japan's Supreme Court has deferred to the Diet in Article 9 cases. Rather than explicitly approving the SDF, the court instead simply allows it to continue. This way, the court reaches the same result as an official adjudication on constitutionality without the associated political fallout. By legislatively adopting the SDF law and judicially allowing it to stand, Japan has effectively changed its constitution.

This de facto constitutionality, based upon an inherent right to self-defense, does not necessarily support sending the SDF abroad.¹³⁴ In the absence of judicial willingness to recognize the SDF, a more extreme holding allowing troop deployment abroad is unlikely. Moreover, the Diet set up the SDF, whereas no similar legislative or executive provision authorizes foreign deployment. Because the court has never approached the issue, there is a complete lack of judicial support for the proposition that sending troops abroad is constitutional.

3. *Executive Branch Interpretation*

a. Background

Constitutional change can also occur by executive branch interpretation of its own powers. Prime Minister Yoshida's 1952 dissolution of the House of Representatives via an imperial rescript is illustrative.¹³⁵ The constitution grants the Cabinet the power to dissolve the lower house,

129. KENPŌ art. 6, ¶ 2 (Emperor appoints Chief Judge of Supreme Court “as designated by the Cabinet”); *id.* art. 79, ¶ 1 (remaining Supreme Court judges are appointed by the Cabinet).

130. Japan's Supreme Court did not find any Diet-enacted law or executive action unconstitutional until 1961. MAKI, *supra* note 111, at xliii.

131. KENPŌ art. 76, ¶ 3.

132. *Id.* art. 79, ¶ 2.

133. *Id.* art. 79, ¶ 3. Nevertheless, this check is not terribly meaningful because the public does not closely follow Japanese court decisions. See ARDATH W. BURKS, *THE GOVERNMENT OF JAPAN* 161 (1964). A highly emotional issue such as the constitutionality of the SDF, however, would probably attract public attention.

134. Self-defense and foreign troop deployment are clearly separate issues. It is one thing to maintain troops for protection of the homeland, and quite another to dispatch these defensive troops abroad, for whatever purposes. Even during discussions surrounding the legitimacy of the Ashida Amendment, proponents distinguished the military use of troops for national self-defense and for international sanction. See Takayanagi, *supra* note 48, at 84; Kades, *supra* note 26, at 237.

135. For a thorough discussion of dissolution generally, as well as Yoshida's 1952 dissolution specifically, see D. C. S. Sissons, *Dissolution of the Japanese Lower House, in*

but seemingly only after the lower house passes a vote of no confidence towards the Cabinet.¹³⁶ Yoshida's decision to dissolve the House of Representatives without a previous vote of no confidence unilaterally expanded the meaning of Japan's constitution. House Member Gizo Tomabechi petitioned the Supreme Court to find the dissolution unconstitutional and invalid, but the Court dismissed the complaint due to a lack of original jurisdiction.¹³⁷ Thereafter, Cabinet power to dissolve the House without a no-confidence vote became generally accepted.¹³⁸

Although Yoshida's dissolution of the House of Representatives was done unilaterally, sending troops abroad can only be done with the agreement of the Diet. The SDF law allows mobilization only when necessary to defend the nation against armed aggression from external forces.¹³⁹ This mobilization decision can be made by the Prime Minister but is subject to the Diet's consent, except in cases of extreme emergency.¹⁴⁰ Because even domestic deployment is subject to Diet consent, foreign deployment is not possible without the Diet's support. Moreover, the SDF law does not consider or authorize sending SDF troops abroad.¹⁴¹ Therefore, if the executive branch desired SDF deployment on foreign soil, it would need either to amend the SDF law or to pass a new authorization bill. Both methods would require Diet approval.

The executive branch sought foreign deployment in the fall of 1990 when an international coalition of military forces joined to enforce U.N. sanctions against the Iraqis invading Kuwait. In response to international pressure, mainly from the United States, Japanese Prime Minister Kaifu introduced a measure to authorize deployment of SDF troops to the Persian Gulf.¹⁴² This unprecedented proposal, if enacted, would have effectively altered the scope and meaning of Article 9 without a formal textual amendment. To effect this type of change, the Cabinet needed the support of the Diet and, implicitly, the support of the Japanese people. This attempted constitutional change of Article 9 via the Cabinet avenue failed, leaving a strengthened respect for the validity of Article 9 as it applies to foreign troop deployment.

AUSTRALIAN NATIONAL UNIVERSITY RESEARCH SCHOOL OF PACIFIC STUDIES, PAPERS ON MODERN JAPAN 91, 115-23 (1968) (Yoshida dissolution).

136. KENPŌ art. 69: "If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten (10) days."

137. Judgment of April 15, 1953, Saikosai (Supreme Court), 7 Minshū 305 (Japan). An English translation can be found in MAKI, *supra* note 111, at 366.

138. See ROBERT E. WARD, JAPAN'S POLITICAL SYSTEM 95 (1967); Sissons, *supra* note 135, at 136.

139. Jieitai ho, Law No. 165 of 1954, art. 76, § 1.

140. *Id.*

141. *Id.*

142. Edward Neilan, *Japanese Plan to Deploy Troops in Gulf Stirs Instant Discontent*, WASH. TIMES, Sept. 28, 1990, at A9.

b. Japan's Response to International Pressure

In Japan's first response to the call for a multinational force in the Persian Gulf, the government sought 100 volunteers to join a Gulf medical team.¹⁴³ Few citizens responded, however, and eventually only seventeen people, some of them government employees, went to the Gulf.¹⁴⁴ All members of the team returned before war broke out in January 1991.¹⁴⁵

The failure of the volunteer plan forced government officials to look elsewhere for Japanese personnel to send to the Gulf. The military was the logical place to look. Constitutional constraints and public opinion, however, complicated the decision. Prime Minister Kaifu¹⁴⁶ had three choices:

1. Recognize the constitutional prohibition against sending troops abroad imposed by Article 9 and refuse to participate militarily in the Gulf.
2. Make sending troops abroad for U.N. purposes legal by enacting a constitutional amendment.
3. Make sending troops abroad for U.N. purposes legal by extra-constitutional means; that is, amending the SDF law or enacting a new deployment authorization law.

Kaifu decided on the third option. On September 27, 1990, the Prime Minister announced a plan for the deployment of a "United Nations Peace Cooperation Team" to Saudi Arabia.¹⁴⁷ The group would comprise "civil service personnel and members of the Self Defense Forces."¹⁴⁸ The plan sidestepped Article 9 by placing SDF personnel on temporary leave from their official military role of defending Japan and into the peace cooperation force.¹⁴⁹ That way, they would not technically be members of Japan's military. As for civilian recruits,

143. David Butts, *Plan to Send Japanese Troops to Gulf Appears Dead*, UPI, Nov. 1, 1990, available in LEXIS, Nexis Library, Wires File.

144. *Id.*

145. *Report from Japan*, YOMIURI NEWS SERVICE, Jan. 3, 1991, available in LEXIS, Nexis Library, Wires File.

146. As Prime Minister, Kaifu led the Cabinet (selected by the Prime Minister) in fulfilling executive functions. He was also the leader of Japan's dominant Liberal Democratic Party (LDP). Japan's Prime Minister is selected by the Diet, each party placing its respective leader on the ballot. Thus, the majority party in effect selects the Prime Minister, who has usually been a Member of the LDP. For more details of the Prime Minister's function, see WARD, *supra* note 138, at 92.

Kaifu became Prime Minister in August 1989 after scandals toppled two more prominent predecessors. *Kaifu Sworn In As Japan's New Prime Minister*, REUTERS, Aug. 10, 1989, available in LEXIS, Nexis Library, Wires File. Kaifu was selected probably more for his clean image than his leadership qualities, and his power base within the LDP was not believed to be strong. *Vision of Japan as U.N. Peacekeeper Attacked by Left, Right*, REUTERS, Sept. 17, 1990, available in LEXIS, Nexis Library, Wires File. His tenure ended in November 1991, after he decided not to run for re-election. KYODO NEWS SERVICE, Nov. 5, 1991, available in LEXIS, Nexis Library, Wires File.

147. Neilan, *supra* note 142.

148. Irene Kunii, *Japan's Kaifu Calls on Legislators to Back Gulf Troop Plan*, REUTERS, Oct. 12, 1990, available in LEXIS, Nexis Library, Wires File.

149. Neilan, *supra* note 142.

Kaifu told a questioning reporter, "If you want to join, just raise your hand. You will be welcome."¹⁵⁰ Kaifu expected the peace cooperation personnel merely to support existing forces in the region, not to engage in combat: "This group will not do anything that will involve military activity or the threat of military action."¹⁵¹

Prior to its introduction in the Diet, the Cabinet formally had to draft the proposal.¹⁵² Compromise in the Cabinet¹⁵³ produced a more militaristic proposal than the bill originally proposed by Kaifu. The Cabinet proposal called for SDF forces, as opposed to resigned or retired SDF members, to go to the Persian Gulf and to operate with significant autonomy once there¹⁵⁴—a response to the military's concern about being sent unarmed into a potential war zone.¹⁵⁵ Although these concessions made Cabinet consensus possible, they exposed the bill to criticism by political opponents in the Diet. The proposal to establish a U.N. Peace Cooperation Team marked the first government-sponsored call for sending Japanese troops abroad since the end of World War II.¹⁵⁶ For the first time, Japan's government sought to deploy SDF forces in a military role on foreign soil, despite the provisions of Article 9.

150. *Id.*

151. *Id.*

152. By law, Japan's Cabinet is responsible for developing foreign policy legislation and for introducing foreign policy bills to the Diet. The Cabinet exercises its powers through consensus decision-making; compromises are made until all Cabinet members agree on a proposal. This is done because each individual Cabinet member is held personally responsible for every official Cabinet decision. WARD, *supra* note 138, at 94.

153. Two powerful politicians, LDP Secretary General Ichiro Ozawa and former Prime Minister Noburu Takeshita split with Kaifu over SDF involvement in the U.N. force. They advocated amending the SDF law to allow uniformed SDF Members to participate in the Gulf as recognized Members of Japan's military, but Kaifu opposed their plan. David E. Sanger, *Confrontation in the Gulf: After Silence, Japan's Army Pushes for Armed Gulf Role*, N.Y. TIMES, Sept. 24, 1990, at A1. The SDF law remained intact, but Kaifu had to alter his original proposal to gain the support of the LDP's right wing. See *infra* note 154 and accompanying text.

154. Steven R. Weisman, *Japanese Disarray Over Sending Troops to Gulf*, N.Y. TIMES, Oct. 26, 1990, at A10.

155. The Japanese military played a significant role in the proposal's formulation. Initially, Kaifu tried to exclude Defense Minister Yoza Ishikawa from the discussions of how to respond to U.S. requests for help. Sanger, *supra* note 153, at A10. SDF members grumbled about not being consulted on the possible deployment, and Kaifu's plan for an unarmed, largely civilian force was heresy to them. "It is nonsense," said one senior SDF officer. "We would be laughed at as a toy army. Frankly speaking, I think if I asked my troops to go under those conditions, many would refuse." *Id.* The military's position did not go unnoticed and gained support of influential leaders such as Ozawa. The *New York Times* reported: "What separates the current debate from past discussions about the scope of Japanese power is that this time the military is hardly sitting on the sidelines." *Id.*

156. Japan experienced a similar struggle in 1987 when the United States asked for Japanese minesweepers during its reflagging of Kuwaiti tankers in the Iran-Iraq War. The discussion was not as emotional then and the ultimate decision to allow deployment came so late that the ships never left port. See *id.*

Before introducing the bill to the Diet, the government announced a new interpretation of Article 9. Relying upon 1961 testimony of an executive branch official given before the Diet, the government asserted that Japan could constitutionally participate in U.N. policing actions.¹⁵⁷ This new interpretation was not self-actuating;¹⁵⁸ the Cabinet needed Diet support. Diet support was implicitly contingent upon the support of the Japanese people.

4. *Legislative Interpretation*

The Cabinet proposal to send SDF troops to the Persian Gulf gave the Diet an opportunity to effect constitutional change without amendment. The Diet passed the SDF law in 1954, but never authorized foreign troop deployment. Consequently, this Cabinet bill was a prerequisite to military activity in the Gulf. If the Diet passed the law, and the Supreme Court allowed it to stand, the meaning of Article 9 would be changed without textual amendment.

From a political standpoint, the Cabinet bill stood a good chance of passing in the Diet because it needed only majority support in each house.¹⁵⁹ Since Kaifu's Liberal Democratic Party (LDP) held a clear majority in the House of Representatives, the bill was expected to pass there.¹⁶⁰ In the House of Councillors, the LDP had 120 of the 253 seats aligned with them on the issue.¹⁶¹ They needed only 127 votes to win.

Nevertheless, public opposition to the Cabinet bill was stronger than the government expected. Due to Japan's experience in World War II, anti-war sentiment and a general distrust of the military are widespread.¹⁶² Five days after the bill was submitted to the Diet, 23,000

157. *Japanese Reportedly Change Stand on Troops in Gulf*, UPI, Oct. 15, 1990, available in LEXIS, Nexis Library, Wires File. Reliance upon a former executive branch official to provide the legal basis for constitutional change is dubious at best. While the Executive Branch can independently effect constitutional change, it requires more than the simple testimony of an executive branch bureaucrat.

158. The Cabinet's interpretation of Article 9 in this situation did not have the same legal effect that Prime Minister Yoshida's dissolution of the House of Representatives had. See *supra* notes 135-38 and accompanying text. The dissolution could be done unilaterally, but the Cabinet needed Diet approval to effect change in interpreting Article 9. Therefore, the Cabinet's new interpretation did not, in and of itself, have any legal effect in altering the meaning of Article 9, but rather had the political effect of making the bill seem more acceptable to the Diet. The new interpretation could only take legal effect if and when the Diet adopted the proposal reflecting the Cabinet's interpretation, and the interpretation in effect became law.

159. KENPŌ art. 56, ¶ 2 ("All matters shall be decided in each House, by a majority of those present, except as elsewhere provided in the Constitution.")

160. "Kaifu's ruling Liberal Democratic Party (LDP) will pass the bill in the lower house, where it holds a majority, but the spotlight will be on the opposition-controlled upper house." Kunii, *supra* note 148.

161. The LDP held 110 seats; the only opposition party to side with the LDP, the Democratic Socialist Party, held 10. *Id.*

162. Many people shared the fear expressed by former Cabinet member Masaharu Gotoda: "If Japan uses this as an opportunity to start sending troops to other countries . . . the door will be opened for Japan to become a military superpower." Mayton Naff, *Japan's Plan to Send Troops to Gulf in Trouble*, UPI, Oct. 23, 1990, available

people gathered to protest.¹⁶³ That week, a *Mainichi Shimbun* newspaper poll indicated that forty-nine percent of Japanese citizens felt sending troops, even in a non-combat role, would violate the constitution, while only sixteen percent disagreed and supported the government's position.¹⁶⁴ From the beginning of legislative debate, the bill's supporters were on the defensive.¹⁶⁵ One government official remarked, "[t]he heat is much more than we anticipated."¹⁶⁶

Widespread public opposition ultimately killed the Cabinet bill. By early November, only ten percent of the Japanese people supported the bill.¹⁶⁷ Even in the House of Representatives, support for the bill unravelled.¹⁶⁸ Diet members from Kaifu's LDP party lobbied against voting on the bill, hoping to avoid the negative political effects of voting for foreign troop deployment.¹⁶⁹ On November 8, Kaifu announced he was dropping the bill without a vote due to its failure to gain support in the Diet.¹⁷⁰

The question of constitutionality of Japan's sending troops to the Persian Gulf was not decided by Japan's Supreme Court. Nor was it decided by the Cabinet, whose interpretation was rejected. The Japanese people, in a strong manifestation of "popular sovereignty," decided the question. The people felt that sending SDF troops abroad was both unconstitutional and undesirable, and they prevented the government from effectuating a change of Article 9.

in LEXIS, Nexis Library, Wires File. Militarism is still held accountable for the devastation that visited Japan during the Second World War. Japanese citizens have not forgotten the effects of that war. "I still have horrible memories," said Shotaro Abe, a banker born in 1942. "My memory is of pain — the pain that hunger creates in your stomach. My whole family was hungry most of the time in those days. That's what war did to us. I don't care how this law is written. I'm against it." Michael Borger, *Japan Split Over Sending Troops to Gulf*, SAN FRANCISCO CHRONICLE, Nov. 1, 1990, at A19.

163. *Japanese Protest Troops for Gulf*, WASH. TIMES, Oct. 22, 1990, at A9.

164. Eugene Mousa, *Japan Opposition Boycotts Debate on Sending Troops to Gulf*, REUTERS, Oct. 23, 1990, available in LEXIS, Nexis Library, Wires File.

165. Public pressure forced Kaifu to announce on October 26 that he had decided sending troops abroad, even in U.N. police actions, was not constitutional. Weisman, *supra* note 154. This effectively reversed the Cabinet position stated 10 days earlier. See *supra* note 157 and accompanying text. Kaifu's reversal may have been merely a return to his original position that led him initially to propose sending only civilians and SDF personnel on temporary leave. See *supra* notes 148-50 and accompanying text.

166. Weisman, *supra* note 154.

167. *Japan's New Gulf Contribution Plan Runs into Immediate Trouble*, REUTERS, Nov. 9, 1990, available in LEXIS, Nexis Library, Wires File.

168. By November, 56% of the lower house members opposed the bill. Of the LDP members in the lower house, fewer than half supported the bill in its Cabinet draft form. Butts, *supra* note 143.

169. "Many members of Mr. Kaifu's own party are trying to derail a vote, so they do not have to go on record as supporting Japan's first overseas military foray in 45 years." David Sanger, *Japan's Gulf Commitment Seems Endangered*, N.Y. TIMES, Nov. 6, 1990, at A14.

170. Butts, *supra* note 21.

5. *Summary of Constitutional Change*

In the absence of some kind of constitutional change, such as that which allowed the creation of the SDF, sending Japanese troops abroad is inconsistent with Article 9 of Japan's constitution. Legitimate legal restraints prevent Japan's participation in international military sanction activities. These are not permanent restraints, however, and the Japanese people could remove them either by constitutional amendment or by the non-textual methods of change described above.¹⁷¹ But for now, no such change has occurred, and the constitutional prohibition against sending troops to foreign lands remains in place and calls into question Japan's ability to fulfill its U.N. obligations.

III. Requirements of the United Nations Charter

Japan's constitutional restraints forbidding foreign deployment of military troops calls into question its ability to fulfill obligations inherent in U.N. membership. This section will discuss general Charter obligations as a background to the central issue of U.N. Member military obligations. This Note argues that Chapter VII of the U.N. Charter, especially Article 43, imposes no legal duty to contribute military forces to U.N. enforcement activities. This Note will support this conclusion by examining contributions to the only pre-1990 U.N. enforcement action, the Korean War. The Korean War precedent appears to establish that non-military contributions adequately fulfill U.N. membership obligations.

A. Obligations Generally

Upon joining the United Nations, a Member Nation becomes subject to the terms of the United Nations Charter. Article 4 expressly states that along with being a "peace-loving state," Members must, as a condition of membership, "accept the obligations contained in the present Charter," and be "able and willing to carry out these obligations."¹⁷² Of prime importance to the current discussion are two general obligations. First, "[a]ll Members shall give the United Nations *every assistance* in any action it takes in accordance with the present Charter;"¹⁷³ second, "[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."¹⁷⁴ With these general obligations in mind, this Note will consider

171. If the Japanese public wanted a military role for Japan in U.N. enforcement activities, change could be effected without constitutional amendment. For example, the Cabinet could introduce a bill calling for SDF participation in U.N. military activities, and if the Diet passed it, the bill would become law. The law would then be subject to Supreme Court review. If the Supreme Court struck the law down as unconstitutional, only then would constitutional amendment be necessary to effectuate the change.

172. U.N. CHARTER art. 1, ¶ 1.

173. *Id.* art. 2, ¶ 5 (emphasis added).

174. *Id.* art. 25 (emphasis added).

the specific obligation of Member States to contribute armed forces to U.N. sanction-enforcement activities.

B. U.N. Sanction Enforcement

Chapter VII of the U.N. Charter, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," contains Articles 39 through 51, which outline the Charter's method of enforcing sanctions against forces that disrupt world peace. Chapter VII includes the obligation to provide military assistance to U.N. activities.

Article 39 empowers the U.N. Security Council¹⁷⁵ to make an initial determination identifying "the existence of any threat to the peace, breach of the peace, or act of aggression."¹⁷⁶ Once a threat is identified, the Security Council can decide upon and invoke military or non-military sanctions.¹⁷⁷

Article 41 outlines and discusses non-military sanctions including severance of economic or diplomatic relations, and restriction of transportation and communication.¹⁷⁸ The Security Council "may call upon Members of the United Nations to apply such measures."¹⁷⁹ Compliance with non-military sanctions is not conditional;¹⁸⁰ each Member is duty-bound, in accordance with Article 25,¹⁸¹ to comply with the Security Council's decision.

If the Security Council feels non-military measures would be or have been insufficient, it can turn to military means.¹⁸² Article 42 grants power to the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."¹⁸³ Permissible actions include blockades or "other operations by air, sea, or land forces of Members of the United Nations."¹⁸⁴ Article 43

175. The U.N. Security Council is made up of representatives from 15 nations. Five nations (the United States, Russia, Britain, France and China) are permanent Members of the Council; the other 10 non-permanent Members are elected to two-year terms. *Id.* art. 23, ¶ 1. The Russian Federation assumed the Security Council seat previously held by the U.S.S.R. on December 24, 1991. *End of the Soviet Union: Soviet U.N. Seat Taken by Russia*, N.Y. TIMES, Dec. 25, 1991, § 1, at 6. Decisions made by the Security Council must be carried by at least nine votes, "including the concurring votes of the permanent Members." U.N. CHARTER art. 27, ¶ 2. Thus each permanent Member of the Security Council in effect possesses a veto power over any Security Council decision.

For a critical discussion of the functioning of the U.N. Security Council during the war in the Persian Gulf, see John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1 (1992).

176. U.N. CHARTER art. 39.

177. *Id.*

178. *Id.* art. 41.

179. *Id.*

180. No conditions are attached to the Article 41 requirement to participate in non-military sanctions once a Member is called upon to do so. *Id.*

181. See *supra* note 174 and accompanying text.

182. U.N. CHARTER art. 42.

183. *Id.*

184. *Id.*

governs the contribution of military forces by U.N. Members. Some commentators refer to Article 43 as containing "the only obligation for a Member State to participate in any way in the military actions of the United Nations, and thereby *defines a nation's liability* insofar as military action is concerned."¹⁸⁵

In its first paragraph, Article 43 states:

All 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.¹⁸⁶

This language explicitly requires all Members to respond to Security Council calls for armed forces. Under Article 25, each Member must comply.¹⁸⁷ "[S]pecial agreement or agreements"¹⁸⁸ govern the method of compliance. Members are obliged to respond to the Security Council "on its call *and* in accordance with a special agreement or agreements,"¹⁸⁹ but it is not clear whether the call or the agreement should occur first.¹⁹⁰

For three reasons, the best interpretation is that the agreements precede the call.¹⁹¹ First, if a Security Council call were required before special agreements could be negotiated, a fresh agreement between the Security Council and each individual Member would be necessary each time a need arose. Although this approach would be flexible and would promote agreements tailored to specific enforcement situations, the practical difficulties of renegotiating agreements with each U.N. Member for every enforcement action would be administratively cumbersome. Furthermore, acts of aggression and breaches of the peace typically do not give advance warning. While new agreements were drafted, the act or threat would grow unimpeded. Negotiating agreements beforehand, considering each Member's ability to contribute, and having forces

185. RIKHYE ET AL., *supra* note 11, at 27 (emphasis added).

186. U.N. CHARTER art. 43, ¶ 1.

187. See *supra* note 174 and accompanying text.

188. U.N. CHARTER art. 43, ¶ 1.

189. *Id.*

190. A "call" refers to an official request by the U.N. Security Council for Member assistance. A call would most likely be in the form of a Security Council resolution. The phrase "agreement or agreements" mentioned in Article 43 refers to independent arrangements negotiated with Members directly by the Security Council. These agreements would set forth levels of Member contribution to U.N. enforcement activities. The agreements would have a treaty-like nature, and would be subject to ratification in accordance with the constitutional process of each respective Member. *Id.* art. 43, ¶ 3.

191. HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 748 (4th ed. 1964):

The most plausible interpretation is that first an agreement shall be concluded by which a Member places at the disposal of the Security Council armed forces, assistance, etc., and then the Council may call upon this Member to make available, for an action decided by the Council, the armed forces agreed upon.

already allocated, would provide a more efficient way for the Security Council to respond. Article 43 calls, made upon allocated troops, would enable immediate response.

Second, Article 43 mandates that agreements be negotiated as soon as possible after Charter ratification, without mentioning a specific purpose for which troops under the agreements would be used.¹⁹² In the absence of a specific threat, the Charter's drafters apparently expected agreements to be made prior to anticipated calls for enforcement. If calls were to precede the agreements, the Charter would not need explicitly to request agreements unless and until a sanction-enforcement need arose.

Finally, the Charter's drafters addressed the question whether a nation could be required to provide more troops than those allocated in special agreements with the Security Council. The interpretation among the drafters of Article 43 was that no troops could be required above and beyond those required by the terms of the special agreements.¹⁹³ Nothing outside the agreements binds Members to supply military troops. Therefore, if no special agreement exists, a Member is not obligated to provide troops in response to a Security Council call.

Consequently, a U.N. Member's obligation to provide armed forces is conditioned in a way that the obligation to respond non-militarily is not. Article 41 requires Members to apply non-military sanctions unconditionally if called upon.¹⁹⁴ By contrast, obligations under Article 43 do not mature until the Member has completed special agreements governing military resources. Thus, in the absence of special agreements, Member States are not under legal obligation to contribute militarily to Security Council calls for armed forces. The special agreement between a Member and the Security Council acts as a contractual condition precedent to that Member's troops being called up for U.N. purposes. This view is generally accepted.¹⁹⁵

Pursuant to the third paragraph of Article 43, the first U.N. Security

192. U.N. CHARTER art. 43, ¶ 2.

193. LELAND GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS 280 (2d rev. ed. 1949).

194. *Supra* notes 178-80 and accompanying text.

195. KELSEN, *supra* note 191, at 980-81, n.3 ("As long as these special agreements are not in force, the obligation of the Members under Article 43 cannot be fulfilled."); D. W. BOWETT, UNITED NATIONS FORCES 277 n.38 (1964) ("All that can be inferred from Article 43 is that national contingents cannot be compelled to fight on behalf of the United Nations without Special Agreements being concluded."); LELAND GOODRICH, THE UNITED NATIONS 161-62 (1959) ("[B]efore Members can be required to take military measures, they must agree to make available on call and 'in accordance with a special agreement or agreements . . . armed forces . . .'"); GOODRICH & HAMBRO, *supra* note 193, at 280 ("[U]ntil a Member has concluded a special agreement with the Security Council, it is under no obligation to take military action under Article 42."); NORMAN BENTWICH & ANDREW MARTIN, COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 97 (1969) ("Pending these agreements . . . [t]here is nothing in the Charter to compel the Great Powers to undertake . . . action; still less would any other Member be bound to join in sanctions initiated by them.")

Council ordered the Military Staff Committee (MSC)¹⁹⁶ to develop a "special agreements" framework for negotiations with Member states.¹⁹⁷ Eager to obtain U.N. forces, the Security Council gave the MSC less than two months to complete its report.¹⁹⁸ Since representatives on the Military Staff Committee were unable to devise a plan acceptable to all five permanent Security Council members, the deadlocked committee failed to produce guidelines for securing agreements with Member States.¹⁹⁹ Consequently, no "special agreements" have ever been secured.²⁰⁰ The U.N. is currently powerless to bind Member States to respond to calls for armed forces.

Anticipating a brief period of time for the agreement negotiation to take place, the Charter drafters provided an interim method of collective security in lieu of special agreements. That method, outlined in Article 106, calls for the five permanent Security Council Members to exercise Article 42 military duties by consulting with one another, and other Member States, to take necessary "joint action" pending the activation of special agreements.²⁰¹ Due to the unexpected delay in securing special agreements,²⁰² Article 106 is the only sanction-enforcement provision technically in effect. A transitional measure, Article 106 is a not designed to have long-term effect. In the two military sanction-enforcement situations to date, Korea and the Persian Gulf, the Security Coun-

196. The Military Staff Committee is created by Article 47. U.N. CHARTER art. 47, ¶ 1. It is made up of the Chiefs of Staff from each of the permanent Members; its duty is to advise the Security Council on military matters and assist in carrying them out. *Id.* art. 47, ¶ 2. See also *id.* art. 47, ¶ 1 (outlining duties of the Military Staff Committee).

197. GOODRICH, *supra* note 195, at 164.

198. *Id.*

199. *Id.* Most disagreements arose between the former Soviet Union and the other four permanent Members. For example, the sides differed on such issues as initial troop contributions by permanent Members (U.S., France, Britain and China favored flexible ability-based contributions, while the Soviets demanded equal contributions in terms of troop size and weapon technology); rights of passage and use of bases (U.S., Britain and China favored such use, the Soviets objected); location of forces not currently engaged in action (U.S., Britain and China felt these forces, according to the special agreements, should be based wherever Member States wanted them, while the Soviets wanted such troops back within the borders of the contributing Member State); and withdrawal of forces after conflict resolution (U.S., Britain, France and China favored Security Council governed withdrawal, and the Soviets demanded immediate withdrawal). LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 321-22 (3d rev. ed. 1969). The distrust generated by the Cold War is mainly to blame for these failures. As the Soviet representative noted, the major differences were political, not technical. *Id.* at 323.

200. For a discussion of other problems caused by the failure to conclude special agreements, see generally William Gehrke, Note, *The Mozambique Crisis: A Case for United Nations Military Intervention*, 24 CORNELL INT'L L.J. 135, 151-52 (1991).

201. U.N. CHARTER art. 106.

202. The Security Council must take the blame for this delay in finalizing special agreements. Article 43 states that these agreements are to be made "on the initiative of the Security Council." *Id.* art. 43, ¶ 3. In light of the Security Council's failure to provide the framework into which troops would be committed, it is not surprising that Member States have not taken the initiative by volunteering troops for general Article 43 purposes. Nor is it their legal duty to do so.

cil did not rely on Article 106 as the basis for U.N. actions, but drew authority from Chapter VII.²⁰³ In response to Chapter VII calls for support, Member States have contributed troops voluntarily—not in response to any Article 43 duty.²⁰⁴

C. The Korean Example

Until the Persian Gulf War, the Korean War was the only concerted military enforcement action taken by a united Security Council under Chapter VII.²⁰⁵ Concerted action was made possible when the Soviet representative walked out on the Council in January 1950 to protest the seating of the Kuomintang Chinese representative as president in rotation.²⁰⁶ Without the threat of a Soviet veto, the Council passed three resolutions, one calling for military sanctions against North Korea.²⁰⁷ The Soviets soon realized their error and returned on August 1, 1950 to prevent further Security Council action.²⁰⁸ Because special agreements had not been made under Article 43, the Council could not invoke the legal duty to contribute troops.²⁰⁹ Rather, the Council “recommend[ed]” that Member States “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack. . . .”²¹⁰ The response to this call was voluntary.²¹¹

Not all assistance was military. Two days after passing the resolution asking for assistance, the Security Council sent resolution copies to Member States asking what support they could give.²¹² According to one commentator, “[t]he replies ranged from specific support of the Resolution and offers of armed forces or other assistance (foodstuffs, medical supplies, air and sea transport, finance, etc.) to general support but with no firm offer of assistance.”²¹³ Thus, in the Korean War, Member States

203. The U.N. Security Council Resolutions regarding Korea did not explicitly state their Charter authority, but simply recommended that Members assist Korea. This language reflects the provision in Article 39 wherein the Security Council is to make recommendations upon determining a breach of the peace. *Id.* art. 39. The authority to make a recommendation probably can be derived from Chapter VII, Article 39. See BOWETT, *supra* note 195, at 32.

The Security Council Resolutions on Iraq’s invasion of Kuwait explicitly base their authority on Chapter VII. See, e.g., S.C. Res. 661, U.N. SCOR, 45th session, 2933d mtg., U.N. DOC. S/RES/661 (1990); S.C. Res. 678, U.N. SCOR, 45th session, 2963d mtg., U.N. DOC. S/RES/678 (1990).

204. RIKHYE ET AL., *supra* note 11, at 25.

205. *Id.* at 4.

206. *Id.* at 28-29. The Soviets did not recognize the Kuomintang Chinese as the rightful owners of China’s Security Council seat, but believed that it belonged to the Communist Chinese government on mainland China.

207. BOWETT, *supra* note 195, at 30-31.

208. FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 34 (1966).

209. *Id.* at 32.

210. S. C. Res. 83, U.N. SCOR, 5th session, 474th mtg., U.N. Doc. S/RES/83 (1950).

211. SEYERSTED, *supra* note 208, at 33.

212. BOWETT, *supra* note 195, at 36-37.

213. *Id.* at 37 (emphasis added).

were requested to supply military troops. Some volunteered troops;²¹⁴ others responded with nonmilitary support.²¹⁵ Because special agreements had not been previously completed, nations not providing troops did not violate their Charter obligations. In the absence of special agreements, the same situation exists today.

IV. Does Japan Deserve U.N. Membership?

Article 43 is the only Article in the U.N. Charter calling for military contributions to sanction-enforcement endeavors.²¹⁶ The legal duty to provide troops is contingent upon special agreements to be negotiated between the Security Council and each Member State, at the Security Council's initiative.²¹⁷ No such agreement has been concluded with Japan, or with any Member State.²¹⁸ In the absence of such agreements, Japan does not have a legal duty to provide troops to U.N. sanction-enforcement activities.

In the Korean conflict, many nations provided support other than by sending troops.²¹⁹ Similarly, Japan was legally justified in sending financial or other non-personnel resources to the Gulf. Bowett characterized pre-agreement contribution to U.N. military forces as "a moral rather than legal obligation."²²⁰ If Japan must choose between a constitutional restraint and a moral obligation, the constitutional restraint must prevail. Moreover, Japan can satisfy the moral obligation in non-military ways.

The question still remains, however, whether Japan, constitutionally prevented from sending troops to U.N. enforcement missions, is fit for membership in the United Nations. Article 4 of the U.N. Charter states that being able and willing to carry out Charter obligations is a condi-

214. The 17 states contributing troops included the U.S., Britain, Australia, Canada, France, Bolivia, Thailand, Turkey, New Zealand, South Africa, and the Philippines. *Offers of Military Assistance to the United Command for Korea (As of 17 October 1952)*, 1952 U.N.Y.B. 214-15, U.N. Sales No. 1953.1.30. U.S. and Korean troops, however, made up 90.42% of ground troops, 93.34% of naval forces, and 99.03% of air forces. BOWETT, *supra* note 195, at 40.

215. For example, Brazil offered \$2.7 million; Uruguay donated \$2 million and 70,000 blankets; Peru, \$65,000; Lebanon, \$50,000; Pakistan, 5,000 tons of wheat; and Iceland, 125 tons of cod liver oil. None of these countries donated military troops or equipment. For donations to Korea for 1950, see *Assistance Offered to the Republic of Korea During 1950*, 1950 U.N.Y.B. 226-28, U.N. Sales No. 1951.1.24. An updated donations list is in *Summaries of Military and Relief Assistance for Korea (As of 15 January 1952)*, 1951 U.N.Y.B. 249, U.N. Sales No. 1952.1.30. Military donations up to October 17, 1952, are found in *Offers of Military Assistance to the United Command for Korea (As of 17 October 1953)*, 1952 U.N.Y.B. 214-15, U.N. Sales No. 1953.1.30. The above countries do not appear on this military list.

216. See *supra* note 185 and accompanying text.

217. U.N. CHARTER art. 43; see *supra* notes 188-90 and accompanying text.

218. See *supra* notes 196-200 and accompanying text.

219. See *supra* notes 213-15 and accompanying text.

220. BOWETT, *supra* note 195, at 561.

tion to membership.²²¹ While the Security Council has never sought Article 43 agreements, might Japan be unworthy of U.N. membership if it did? According to Hans Kelsen:

The special agreements referred to in Article 43 do not refer to the question as to whether or not the Member shall provide armed forces and especially national air-force contingents; they refer only to the question how these obligations established by the Charter itself shall be fulfilled on the part of the Member.²²²

This view suggests that if the Security Council pursued agreements, non-military contribution would not satisfy Article 43 requirements. The agreements only decide the type and quantity of military aid and not whether it will be forthcoming at all.

Mandatory military contribution is supported by the Military Staff Committee (MSC) interpretation of Article 43. During its unsuccessful meetings to establish guidelines for Security Council agreements with Member States,²²³ the MSC developed forty-one Articles. Only twenty-five of these were unanimously accepted, as differences could not be resolved on the others.²²⁴ Even though the unanimously accepted Articles do not have legal weight, they show how the MSC envisioned agreements to occur. MSC Article 9 was accepted as follows: "All Member Nations shall have the opportunity *as well as the obligation* to place armed forces, facilities and other assistance at the disposal of the Security Council on its call *and in accordance with their capabilities* and the requirements of the Security Council."²²⁵

A literal reading of MSC Article 9 and Kelsen's commentary suggests that if and when agreement negotiations take place, purely non-military proposals would be insufficient because Article 43 obliges Member States to provide armed forces. If all nations must provide military troops when the Security Council concludes Article 43 agreements, Japan would be unable to fulfill that obligation. Japan would consequently be unable to carry out Charter obligations as required by Article 4,²²⁶ and therefore possibly unworthy of U.N. membership.

The argument that Article 43 agreements must include military donations fails for three reasons. First, some Member States, Iceland for example, have no military. Although these Members would never be

221. U.N. CHARTER art. 4, ¶ 1: "Membership in the United Nations is open to all other peace-loving states which *accept the obligations contained in the present Charter* and which, in the judgment of the organization, *are able and willing to carry out these obligations.*" (emphasis added).

222. KELSEN, *supra* note 191, at 750.

223. *See supra* notes 196-99 and accompanying text.

224. GOODRICH & HAMBRO, *supra* note 193, at 282.

225. *Report by Military Staff Committee on the General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations*, art. 9, U.N. DOC. S/336 (1947), reprinted in LOUIS B. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 86 (1956) [hereinafter *Military Staff Report*] (emphasis added).

226. *See supra* note 221.

able to comply with a request for troops, they retain membership status. Indeed, it would seem ironic to force a nation to militarize in order to retain membership in an organization formed to "save succeeding generations from the scourge of war."²²⁷

Second, the U.N. Military Staff Committee, as expressed in MSC Article 14, was sensitive to this ability-to-contribute issue:

- Contributions by Member Nations of the United Nations, other than the Permanent Members of the Security Council, *may not necessarily be represented by armed forces*. Such other Member Nations which may be unable to furnish armed forces may fulfill their obligation to the United Nations by furnishing facilities and other assistance in accordance with agreements reached with the Security Council.²²⁸

Again, this Article is not legally binding, but it illustrates the unanimous MSC position that contributions other than armed forces would satisfy Article 43 obligations.

Third, U.N. Charter Article 48 grants the Security Council discretion in determining which Members will participate in any particular enforcement activity.²²⁹ This provision probably envisions regional participation in local conflicts, but other factors could influence Security Council decisions, including the constitutional restraints of Member States. If the Security Council may exempt Japan from contributing militarily to any one enforcement mission, it has power to exempt Japan from all enforcement missions. Any Article 43 agreement could explicitly include a general Article 48 exemption stating the reasons therefore. Japan could then agree to contribute in other areas to compensate for the lack of military support.

To be consistent, the MSC Article 9 imposition of an "obligation to place armed forces, facilities, and other assistance at the disposal of the Security Council"²³⁰ must be viewed in light of MSC Article 14. The Article 9 obligation to provide "armed forces, facilities and other assistance" is not meant to bind each Member to all three forms of contributions. Rather, each Member must provide one, two, or all three of the items listed, according to ability. Kelsen's statement²³¹ can similarly be read, expressing simply that the agreement negotiations would not discuss whether states would contribute troops and other assistance, but rather would examine what combination and quantity of those items a Member would contribute.

Article 43 also makes the negotiated special agreements contingent upon ratification by the Member State's constitutional procedures.²³²

227. U.N. CHARTER preamble.

228. *Military Staff Report*, *supra* note 225, at 87 (emphasis added).

229. U.N. CHARTER art. 48, ¶ 1.

230. *See supra* note 225 and accompanying text.

231. *See supra* note 222 and accompanying text.

232. U.N. CHARTER art. 43, ¶ 3.

The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the

Since the agreements can be invalidated by legislatures, the Charter appears to defer to Member States' procedural law. And though Article 103 makes U.N. Charter obligations supreme over other international treaties,²³³ Article 43 makes the Charter pay deference to the procedural constitutional law of each Member.²³⁴ The Charter is silent as to substantive constitutional law, but it seems unlikely that the Charter would require a Member to violate its own constitution to fulfill Charter obligations.

In summary, the U.N. Charter does not require military donations from Member States; such donations are purely voluntary.²³⁵ Members have the moral obligation to contribute to sanction-enforcement activities²³⁶ and must fully comply with economic embargoes.²³⁷ Military contributions, however, are not legally required until a Member ratifies a special agreement with the Security Council.²³⁸ Moreover, the ability to supply military troops is not a prerequisite to Article 43 agreements.²³⁹ Members, like Japan, who cannot send troops abroad, can contribute to Article 43 sanction enforcement by donating "assistance and facilities"²⁴⁰ and thereby demonstrate that they are "willing and able"²⁴¹ to carry out their Charter obligations.

Conclusion

Japan's constitution limits military participation in U.N. enforcement activities. Japan has satisfied U.N. responsibilities in this area with non-military contributions. In the Persian Gulf War, Japan was unable to respond to international pressure for troops, but participated in the economic embargo and pledged thirteen billion dollars in non-military contributions.²⁴² Japan's financial contribution had a much greater impact than a token 2,000 person force envisioned by the failed U.N. Cooperation Bill.

During the Persian Gulf War, Japan's leaders had three choices:

1. To recognize the constitutional prohibition against sending troops abroad imposed by Article 9 and to refuse to participate militarily in the Gulf.

Security Council and Member States or between the Security Council and groups of Member States and *shall be subject to ratification by the signatory states in accordance with their constitutional processes.*

Id. (emphasis added).

233. *Id.* art. 103.

234. *See supra* note 232.

235. *See supra* notes 194-204 and accompanying text.

236. *See supra* note 220 and accompanying text.

237. *See supra* notes 178-81 and accompanying text.

238. *See supra* note 195 and accompanying text.

239. *See supra* notes 227-31 and accompanying text.

240. U.N. CHARTER art. 43, ¶ 1.

241. *Id.* art. 4, ¶ 1.

242. *See supra* note 1.

2. To make sending troops abroad for U.N. purposes legal by enacting a constitutional amendment.
3. To make sending troops abroad for U.N. purposes legal by extra-constitutional means; that is, by amending the SDF law or enacting a new deployment authorization law.

In the future, when similar situations arise, Japan will have the same three choices. Depending on the circumstances, the people of Japan may then allow military troops to be sent abroad. Only when the Japanese are willing to take that step will constitutional change, either by amendment, or by informal means, be possible.²⁴³ One of MacArthur's goals during the occupation was to install a strong democratic system, unlike anything the Japanese had ever experienced. It is now because of that strong democracy that the ideals in Article 9 are preserved.

In the meantime, the government of Japan should respond quickly and generously to future U.N. calls for assistance with non-military resources and should take a firm, principled stand behind its constitution. Other nations, and certainly the U.N., should understand Japan's position and resist pressuring change. Since the adoption of the "Peace Constitution," the Japanese have viewed it as an ideal for the rest of the world to follow. If all nations had constitutions like Japan's and lived by them, the U.N.'s job of peacekeeping would be much easier. Having learned about the scourges of war by experiencing them first hand in the 1940s, Japan is now determined never to repeat those horrors. While Japan's refusal to contribute militarily to U.N. sanction-enforcement actions may look like a free ride, the world may one day regret pressuring an economic superpower to be more militaristic.²⁴⁴

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243. After the end of the Persian Gulf War, the LDP set up a Special Research Council for International Contribution, chaired by former party general secretary Ichiro Ozawa. The committee was designed to consider the legal relationship between Japan's constitution and the U.N. Charter, and to discuss methods of contributing in some fashion to future U.N. peacekeeping operations. Hara Oishi, *Troop Role on Agenda of LDP Panel; Ozawa to Head New Research Council on Japan's World Role*, NIKKEI WEEKLY, June 1, 1991, available in LEXIS, Nexis Library, Wires File. Additionally, in December 1991, the Diet failed to pass another U.N. peacekeeping-related bill, this one sponsored by new Prime Minister Kiichi Miyazawa. The bill, authorizing foreign deployment of SDF troops for emergency relief missions and non-combat U.N. peacekeeping activities, was passed by the lower house despite a brawl that broke out during deliberations. Sam Jameson, *Japan's Lower House Ok's Sending Military Overseas*, L.A. TIMES, Dec. 4, 1991, at A1; Michael Nol, *Opposition Parties Stall Peacekeeping Bill*, UPI, Nov. 29, 1991, available in LEXIS, Nexis Library, Wires File. The bill stalled in the upper house, which deferred consideration to the next ordinary Diet session. KYODO NEWS SERVICE, Dec. 30, 1991, available in LEXIS, Nexis Library, Wires File. Prime Minister Miyazawa has vowed to continue to fight for passage of such a bill. *Id.*

244. As this issue went to press, the Japanese Parliament approved a bill authorizing Japanese military personnel to participate to a limited extent in international peacekeeping operations. See David E. Sanger, *Japan's Parliament Votes to End Ban on Sending Troops Abroad*, N.Y. TIMES, June 16, 1992, at A1; David E. Sanger, *Japan's Troops May Sail, and the Fear is Mutual*, N.Y. TIMES, June 21, 1992, § 4, at 4.

