

# REINTERPRETING ARTICLE 9 OF JAPANESE CONSTITUTION: WAR, PEACE AND SELF-DEFENSE

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## ABSTRACT

*Self-defense has been recognized internationally as an inherent sovereign right. However, Japan in its attempt to ensure never ever to be revisited by the horrors of war, took the drastic step of demilitarizing and renouncing war and entrenched its cherished pacifism in its Constitution. Article 9 was the torchbearer of this pacifism and was very much appreciated by the world community. The interpretation of Article 9 have been evolving ever since the creation of Japanese Self-Defense Forces and recently in July, 2014, the Abe cabinet, in a landmark shift in policy, adopted a resolution reinterpreting Article 9 to involve right to come to the aid of allies.*

*In this article, the author analyses the international legal implications of this reinterpretation in light of the contemporary issues including the expectations of the global community for greater direct contribution from Japan in coping up with common security threats like terrorism, acts of aggression etc. through effective participation in UN peacekeeping operations, the changing nuances of the US-Japan security treaty and the fragile peace in the South-Asian region.*

*Japan is demanding for a permanent membership in the UN Security Council. But as a UN member, it has always been criticized for offering too little, too late in the UN missions. The recent beheading of two Japanese Nationals by the ISIS and the subsequent daring declaration of PM Abe of not succumbing to terrorism and joining the global fight against terrorism has brought Japan in the focus of the extremist groups also who had hitherto remained virtually indifferent towards Japan.*

*In wake of these circumstances, how the Article 9 has hitherto evolved? Is Japan slowly moving towards re-militarization after an almost peaceful history of about 70 years? These are the areas which the author has attempted to uncover.*

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## 1. INTRODUCTION

The principle of self-defense was a precept of the *jus naturale* and *jus gentium*, and is universally recognized as an inherent right<sup>1</sup> in international law.<sup>2</sup> But in the dynamic global scenario where sovereign relations are so intertwined and equations of friend and foe change with the slightest intervening factor, where the weapons of mass destructions are so advanced that another direct war would virtually mean the advent of the dooms day – the connotations of ‘war’ are subtle and so are the nuances of ‘self-defense’.

Japan's cabinet in July, 2014, approved a landmark change in its security policy, making way for its forces to fight overseas.<sup>3</sup> The so called ‘dimensional change’ rather than policy shift was awaited and deliberated for 18 months despite wariness among many Japanese voters worried about entanglement in foreign wars and angry at what some see as a gutting of the Constitution’s war-renouncing Article 9.<sup>4</sup> The resolution taken by the Abe government on July 01, 2014, talked about policy of pro-active contribution to peace, avoiding armed conflicts before they materialize while increasing ‘deterrence’.<sup>5</sup>

Japan’s preamble portrays Japan’s desire to live in “an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth.” Its people wish never again to be “visited with by the horrors of the war”.<sup>6</sup> It also draws from Article 13 in its requirement that the government protect its citizens’ “right to life, liberty, and the pursuit of happiness.” Being the only victim of the nuclear weapons in the world, no one can better identify with the futility and horrors of war than

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<sup>1</sup> Art. 51, Charter of the United Nations.

<sup>2</sup> P. Allan Dionisopoulos, *The No-War Clause in the Japanese Constitution*, 31 Indiana Law Journal 437, 437 (1956), available at: <http://www.repository.law.indiana.edu/ilj/vol31/iss4/1>, last seen on 14/03/2015.

<sup>3</sup> *Japan cabinet approves landmark military change*, BBC’s News Asia (01/07/2014), available at <http://www.bbc.com/news/world-asia-28086002>, last seen on 14/03/2015.

<sup>4</sup> Linda Sieg & Kiyoshi Takenaka, *Japan poised to ease constitution's limits on military in landmark shift*, Reuters (30/06/2014), available at <http://www.reuters.com/article/2014/06/30/us-japan-defense-idUSKBN0F52S120140630>, last seen on 14/03/2015.

<sup>5</sup> Ministry of Foreign Affairs, Japan, *Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People*, available at [http://www.mofa.go.jp/fp/nsp/page23e\\_000273.html](http://www.mofa.go.jp/fp/nsp/page23e_000273.html), last seen on 14/03/2015.

<sup>6</sup> Constitution of Japan, Preamble.

Japan. Deep scar left on the nation's psyche by the trauma and tragedy of war-loser country and the suffering, death and devastation that ensued to the nationals of the losing state – all contributed incredibly to the strong antiwar emotions of the nation and the religious acceptance of the “No War Clause” of the Constitution. The wide international recognition of Article 9 as a regional and international peace mechanism contributing to peace and stability in Northeast Asia and serving as a legal framework to promote peace, disarmament and sustainability, its nomination for last year's Nobel Peace Prize<sup>7</sup> highlighted its role as a tool for peace.

Yet, within less than a decade of the enactment, Japan possessed Self-Defense Forces (SDF) on the land, at sea, and in the air. On the one hand, why does Japan have a Constitution which does not incorporate the right of a nation to defend itself? On the other, why does Japan have what are for all intents and purposes an armed forces despite the presence of a clause with language specifically denying itself the right to maintain such?<sup>8</sup>

The move divided the country in two – while the supporters of the revision stated that there had been no change to Japan's pacifism, the critics felt Abe was pushing Japan towards remilitarization after nearly 70 years of peace and that this was the first step towards permanent revision or removal of Article 9<sup>9</sup>. While the general populace was very much apprehensive about the move<sup>10</sup>, what went at the diplomatic level remained a brain-storming exercise for the intellectuals. Protests within the country were noteworthy meanwhile; the concerns of China with whom Japan is currently engaged in a bitter territorial dispute and other Eastern countries<sup>11</sup> apprehended turbulence in the East Asian

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<sup>7</sup> Ankit Panda, *Article 9 of Japan's Constitution: Nobel Peace Prize Laureate Material?*, The Diplomat (25/04/2014), available at <http://thediplomat.com/2014/04/article-9-of-japans-constitution-nobel-peace-prize-laureate-material/>, last seen on 16/03/2015.

<sup>8</sup> Mayumi Itoh, *Japanese Constitutional Revision: A Neo-liberal Proposal for Article 9 in Comparative Perspective*, 41 Asian Survey 310, 310 (2001), available at <http://www.jstor.org/stable/10.1525/as.2001.41.2.310>, last seen on 10/03/2015.

<sup>9</sup> Supra 3.

<sup>10</sup> See Reiji Yoshida & Tomohiro Osaki, *Fiery suicide bid shocks Shinjuku on eve of historic security decision*, The Japan Times (30/06/2014), available at <http://www.japantimes.co.jp/news/2014/06/30/national/fiery-suicide-bid-shocksshinjuku/#.U9bu pPmSx7N>, last seen on 16/03/2015.

<sup>11</sup> See *China, S. Korea Warn against Japan's Defense Policy Shift*, China Radio International (02/07/2014), available at <http://english.cri.cn/12394/2014/07/02/2702s834121.htm>, last seen on 16/03/2015; also see J. Berkshire Miller, *Japan's Defense Reforms and*

international peace. Their reasons included the tensions in Northeast Asia - markedly between Japan, China and the Koreas over territorial disputes, historical recognition issues and nuclear weapons programs which due to the reinterpretation of Article 9 threatened to further destabilize the fragile peace in the region.

As per the official version, the change only meant that in the past Japan could use force only in self-defense. Japan's military would now be able to come to the aid of allies though only if they come under attack from a common enemy. Other conditions were to apply including that there should be a clear threat to the Japanese state and that people's right to life and liberty. Nonetheless, this would officially include Japan shooting down a missile fired by North Korea at the US and Japan taking part in mine-sweeping operations in key sea lanes during a conflict. PM Abe said that the change did not mean taking part in multilateral wars, like the US-led war in Iraq.<sup>12</sup>

However, within less than a year, Japan found itself witnessing its first experience with global terrorism. Killing of two Japanese by the ISIS, Japan's refusal to bend to the terrorist threats and open declaration of full co-operation to the global community in fight against terrorism has revived the apprehensions of Japanese Populace – Is Japan really heading towards re-militarization after a peaceful history of 70 years?

## 2. EVER EVOLVING INTERPRETATION OF ARTICLE 9: DEFENDING A PACIFIST NATION

The origin of Article 9 remains shrouded in mystery. While it has been claimed by the SCAP, General MacArthur, that the war renouncing clause was not his idea but suggested by prime minister Shidehara<sup>13</sup>, Shigeru Yoshida, Shidehara's Foreign Minister and later Prime Minister,

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*Korean Perceptions of Japan's Collective Self-Defense*, 3 *The Asian Forum* 1, 1 (2014), available at <http://www.theasianforum.org/japans-defense-reforms-and-korean-perceptions-of-japans-collective-self-defense/>, last seen on 16/03/2015.

<sup>12</sup> *Supra* 3.

<sup>13</sup> D. Macarthur, *Reminiscences*, 302, 303 (1964) in James E. Auer, *Article Nine Of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 43 *Law of Contemporary Problems* 171, 173, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4046&context=lcp>, last seen on 14/03/2015.

stated his belief that MacArthur suggested the idea to Shidehara and Shidehara agreed.<sup>14</sup> Irrespective of whether the origins of Article 9 were in Tokyo or Washington, soon the U.S. realized the frustratingly restraining nature of the provision and found itself burdened with the security of a defenseless nation from the surrounding powers lest it be annexed by any emerging rival power in the South-East. So, Post Korean War outbreak in 1950, and MacArthur clarified that he had never intended a blanket ban on Japan's military power for self-defense.<sup>15</sup>

Article 9 of Japan's Constitution reads as follows:

1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
2. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.<sup>16</sup>

Over the time three lines of possible interpretation of the text of Article 9 evolved.

The first line was that Article 9 does not prohibit a defensive war. The rationale behind justifying war in self-defense as permissible under Constitution is the custom of interpreting similar phrases in similar sense; since the General Treaty for the Renunciation of War (Kellogg-Briand Pact) of 1928 contained similar phraseology 'war for the solution of international controversies' which excluded a war in 'self-defense'. Language of Article 9, on the same lines, reads '...as a means of settling international disputes'. Thus, drawing the analogy from the consistent interpretation, Article 9 was interpreted by majority of scholars to be excluding a defensive war.<sup>17</sup> Thus, right to self-defense was balanced out with the war-renouncing clause just as Article 2(4) of UN charter has been balanced with Article 51 of the same. As for the second paragraph, the phrase 'in order to accomplish the aim of the preceding paragraph'

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<sup>14</sup> S. Yoshida, *The Yoshida Memoirs: The Story of Japan in Crisis*, 137 (1962) in James E. Auer, *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Constitution of Japan Art. 9.

<sup>17</sup> *Supra* 13.

provided sound basis for arguing in favour of maintaining armed forces for self-defense. As the preceding Paragraph not prohibit a defensive war, an armed force for that purpose would not be against the aim of the preceding paragraph. Further, it was reasoned that Article 66, paragraph 2, of the Constitution, which requires the Prime Minister and other Ministers of State to be civilians, makes no sense if any war is not permitted by the Constitution, because military personnel would not exist if any war is not permitted.<sup>18</sup>

The opponents on the other hand argued that Article 9 is worded in a language stringent enough to bar any kind of war, whether offensive or defensive. By virtue of first Para, right to war is renounced absolutely and the presence of second Para restricts Japan from maintaining any war potential – defensive or offensive. The arguments rests on two grounds: (1) all wars, including a war in self-defense, can be means of settling international disputes; and (2) practically speaking, it is very difficult to distinguish a war of invasion and a war in self-defense.<sup>19</sup>

A third view point which can be conveniently called the middle path or the split approach to Article 9 is the one devised and taken by the Japanese government as its initial policy during the drafting of the Constitution itself. This line of interpretation goes to state that though Japan retains its right to self-defense under the first paragraph, yet by virtue of the second paragraph, it cannot maintain any war potential (armed forces). Hence it will have to rely upon police power or *ad hoc* militia for resisting foreign aggressions.

Despite its absurdity and impracticality, this third interpretation was the one adopted by the government during its initial legislative debates and public statements as to its army policy. This naturally questions the validity and legal status of the Japanese SDF which emerged as the National Police Reserve in 1950 on the order of MacArthur even as the Japanese constitution had banned armed forces and are today one of the world's 10 most costly military establishments<sup>20</sup>. It can be very difficult in practice to maintain the distinction between the army and the police, as MacArthur's own experience in Japan suggested. It may be equally difficult to distinguish between a war and a police action. The Korean

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<sup>18</sup> Ibid.

<sup>19</sup> See Supra 13.

<sup>20</sup> Ibid.

War was called a “police action” by President Truman, who had not asked Congress for a declaration of war.<sup>21</sup>

Interpretation of this article has varied, broadly, from absolute pacifism to admission of the need for utilization of a collective self-defense right. Although the Constitution draft was modified so many times to keep some scope for a defensive force for Japan, and although MacArthur himself supported the self-defense forces, Japanese government’s initial take on the issue was that all armed force was outlawed for all purposes. Since then, the interpretation of Article 9 has followed closely the political needs of U.S. and Japan.

As noted above, initially the Japanese government was of the view that though defensive war is not banned *per se*, yet as a result of not recognizing any war potential and the right of belligerency of the state in paragraph 2 of Article 9, Japan cannot maintain an armed force. Reliance was made upon the United Nations as the protector of the nation against any aggression. However, soon the cold war escalated in 1950s and the UN did not function as anticipated and soon the Korean War also broke out. US realized the importance of Japan as a significant military base as also a valuable economic partner to be saved from other emerging powers. At this time, the US-Japan security treaty was signed whereby the US urged Japan to raise its own armed forces for self-defence and a new interpretation adopted. American pressure led to the creation of a ‘police reserve’, which was later upgraded to Self-Defence Forces (SDF) in 1954.<sup>22</sup>

At this time, the government ‘clarified’ its stance by saying, “The Constitution, while renouncing war, has not renounced fighting for self-defense. ... To repel armed attack in the event of such an attack from other countries is self-defense itself, and is essentially different from settling international disputes. Hence, the use of force as an instrument for defending national territory when an armed attack has been launched against the nation does not violate the Constitution. ... It is not a violation of the Constitution for Japan to set up an armed force such as

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<sup>21</sup> Theodore McNelly & Clark Hosmer, *General Macarthur's Pacifism*, 6 International Journal on World Peace 41, 54 (1989), available at <http://www.jstor.org/stable/20751321>, last seen on 10/03/2015.

<sup>22</sup> See First Report of the Advisory Panel on Reconstruction of the Legal Basis for Security, *The Advisory Panel on Reconstruction of the Legal Basis for Security*, (2008), available at <http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf>, last seen on 10/03/2015.

the SDF having a mission for self-defense and to possess military force to the extent that is necessary for that purpose”.<sup>23</sup>

Even then, the caveat of no-offensive war and exclusive territorial coverage prevailed meaning thereby that the SDF may not be armed with offensive weapons or dispatched overseas (even on United Nations missions). Every military facility has been assessed in the light of whether it would constitute the ‘war potential’ or not. The three non-nuclear principles are worth mentioning in this context as they provide for Japan that: (1) that it will not possess nuclear weapons; (2) that it will not produce nuclear weapons; and (3) that it will not allow them to be introduced in Japan.<sup>24</sup>

The need for stronger military was gradually accepted even as government maintained the position that SDF did not constitute the ‘war potential’ but merely the ‘defensive potential’. All this happened when the SDF was increasingly becoming a meaningful element of the U.S.-Japan Treaty which is US’ most important security arrangement anywhere in the Pacific and which already rivals in importance with the US ties with the NATO. Japan’s defense budget is third largest in the world and largest among non-nuclear powers and its military capacity rivals those of the advanced armies like the Royal Army and U.S. army.<sup>25</sup>

The next landmark push towards re-militarization was the infusion of idea of ‘collective self-defense’ in the interpretation. Though the idea was already introduced as a sovereign right under UN Charter through the first US-Japan treaty, it practically covered areas ‘under the territories of Japan’ only.<sup>26</sup> After this, various incremental steps towards a broader defense power were justified through the right of self-defense with various connotations. Since his 2012 re-election, PM Abe, a

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<sup>23</sup> Ibid, at Seiichi Omura, Director-General of the Defense Agency, Budget Committee of the House of Representatives (1954) in First Report of the Advisory Panel.

<sup>24</sup> Hitoshi Nasu, *Article 9 of the Japanese Constitution: Revisited in the Light of International Law*, 9 Journal of Japanese Law 50, 54(2004).

<sup>25</sup> See Supra 13, at 184.

<sup>26</sup> See US-Japan Treaty of Mutual Cooperation and Security, 1960, Article 5 of the revised treaty provided, “...Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter...”.



conservative-nationalist, has been gradually reinterpreting (read rewriting) the pacifist Constitution and now this new resolution adopting new interpretation of Article 9 has been passed by the Abe cabinet on July 01, 2014 which paved way for 'proactive collective self-defence'. The new interpretation expands the scope of collective self-defence by including a right to act preventively to defend allies even before the threat materializes to Japan. Even if there is a 'danger' to the peace of Japan, it can react with use of force to defend the ally.

The final draft of the Cabinet document said that Japan could intervene militarily "when an attack on a country that 'has close relations' with Japan 'poses a clear danger of threatening our country's existence and fundamentally overthrowing our people's lives, freedom and right to pursue happiness". According to the new conditions, Japan can come to the aid of a friendly nation if<sup>27</sup>: -

- i. The attack on that country poses a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to life, liberty and the pursuit of happiness.
- ii. There is no other way of repelling the attack and protecting Japan and its citizens.
- iii. The use of force is limited to the minimum necessary.

Previously, Japan was allowed to come to the aid of any country surrounding its territory, indulge in virtually full-fledged war in the name of defense in case the contingency arise threatening the peace and security of its nationals, however, it was not allowed to interfere proactively in aid of any other country if it was not directly targeted too. Now, with the reinterpretation, SDF can operate preventively in aid of other state in pursuance of pro-active collective self-defense also.

### 3. INTERNATIONAL LEGAL CONNOTATIONS

The issue of national defense and security necessarily involves international aspects in a material sense, in so far as it encompasses the defense against external threats as much as internal threats. It entails international dimensions in a legal sense as well, since there exist a

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<sup>27</sup> Ayako Mie, *Abe wins battle to broaden defense policy*, The Japan Times (01/07/2014), available at <http://www.japantimes.co.jp/news/2014/07/01/national/coalition-agrees-on-scrapping-pacifist-postwar-defense-policy/#.VBZTCvmSzMt>, last seen on 17/03/2015.

number of international rules of law to regulate military conducts undertaken for the purpose of national defense and security, including notably the Charter of the United Nations (hereinafter referred to as **'U.N. Charter'**).<sup>28</sup> Japanese Constitution itself acknowledges the significance of observing international law in Article 98 (2) of the constitution.

Irrespective of all the interpretative efforts to reconcile self-defense with pacifism, Article 9 has certainly created a gap vis-à-vis the internationally realized nuances of self-defense under the general international law as also the UN Charter.

Right of self-defense in international law has seen an expansion in its actual exercise. An extreme defense action was eminently illustrated when the Israeli fighter-bombers attacked and destroyed Iraq's Osiraq nuclear reactor near Baghdad only days before the reactor was set to come online just in anticipation of Iraq possessing nuclear weapons, which would have posed a huge risk to the Israel's national security.<sup>29</sup> Armed reprisals by Israel and U.S. have been justified in the name of self-defense against the presumable terrorist activities going in those states even though there was no direct and imminent threat of any terrorist attacks.. The notion of "pre-emptive self-defense" against remote, and not imminent, security threats is progressively getting global support. This way, the right of self-defense of states has in practice been widely interpreted, with a variety of justifications being sought for it by academicians and diplomats. Even the Japanese aggression in Manchuria in 1932 was done in the name of right of self-defense which nonetheless highlights the risks inherent in expanding the concept of right of self-defense.<sup>30</sup>

Noticeably enhanced defense budget, lifting of ban on export of arms<sup>31</sup>, expansion of SDF's activities globally and locally, and reinterpretation of

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<sup>28</sup> Supra 24; See Art. 2 (4), U.N. Charter.

<sup>29</sup> D'Amato, Anthony, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, Faculty Working Papers, Working Paper Number 76, Northwestern University School of Law, (2010); also see Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 The American Journal of International Law 599, 601 (2003), available at <http://www.jstor.org/stable/3109845>, last seen on 14/03/2015.

<sup>30</sup> Supra 24.

<sup>31</sup> Jeff Kingston, *Weapons for peace and proactive pacifism*, The Japan Times (12/04/2014), available at <http://www.japantimes.co.jp/opinion/2014/04/12/commentary/weapons-for-peace-and-proactive-pacifism/#.VQIYXI6Uf6P>, last seen on 10/03/2015.

Article 9 which now allows SDF to defend its ‘allies’ under attack as an exercise of collective self-defense – Japan is certainly shifting its focus towards military empowerment.<sup>32</sup> Nevertheless, the new interpretation takes the obvious attention to some of the more controversial aspects of Japan and its international relations – the role of Japan in UNPKOs, its relation with US under the mutual cooperation treaty and last but not the least – changing equations in the East-Asian global community.

### ***3.1. Japan’s International Security Commitments: UN PKOs***

The effects of Article 9 were multifarious and complicated. While on one hand it regained Japan the lost trust of the world community, particularly the earlier victims and new victors of Imperial Japan, on the other it put the country in a fix by creating a bottleneck when it came to Japan’s participation in international peace activities including U.N. peacekeeping operations (UNPKOs).<sup>33</sup>

Japan is a member of United Nations. Every member of the United Nations is obliged to comply with the decisions of the Security Council.<sup>34</sup> Also, it is constitutionally obliged under Article 98 of its Constitution to ‘faithfully observe the treaties’ concluded by it<sup>35</sup>. However, the way of implementing the decisions is left to the discretion of the member states in absence of a special agreement.<sup>36</sup> Hence in absence of any special agreement, there is no legal mandate on Japan to send its armed troops under U.N. peace operations.<sup>37</sup> Strong claims made from abroad during the U.N. military operation in the Gulf Crisis should be seen as political rather than legal pressure, in view of Japan’s large military capacity.<sup>38</sup>

Domestically speaking, there is no specific prohibition – constitutional, legal or otherwise – in cases where the dispatch is not for the purpose of using force. Hence, deployment for other purposes such as peacekeeping

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<sup>32</sup> *Terrorism Threatens Japan*, The Hindu (04/02/2015), available at <http://www.thehindu.com/opinion/editorial/editorial-terrorism-threatens-japan/article6853387>. ece, last seen on 10/03/2015.

<sup>33</sup> Ibid.

<sup>34</sup> Art. 25, United Nations Charter.

<sup>35</sup> Art. 98, Constitution of Japan.

<sup>36</sup> Art. 45, United Nations Charter.

<sup>37</sup> Supra 24.

<sup>38</sup> Yamaguchi Jiro, *The Gulf War and the Transformation of Japanese Constitutional Politics*, 18 *Journal of Japanese Studies* 155, 158 (1992), available at <http://www.jstor.org/stable/132710>, last seen on 10/03/2015.

becomes permissible under the Constitution.<sup>39</sup> However, any Japanese contribution to UN peacekeeping operations requires compliance with Japan's 1992 Law Concerning Cooperation for UNPKOs. It stipulates five principles for Japan's engagement, including the need for a ceasefire to be in place, consent of the parties to the deployment, maintenance of strict impartiality and the minimal use of weapons. These conditions imposed in an attempt to save the action from the sweep of 'offensive war' have indeed frustrated the aid thus given by the SDF troops' altogether. For instance, if there is already a ceasefire in operation, there is no reason why SDF would be even required with their 'minimal' use of weapons. As soon as the ceasefire ends, the SDF would any way not be able to continue with their 'aid'.<sup>40</sup> In this light, the Japanese aid is self-defeating and futile.

Nevertheless, Japan has deployed over 10,300 personnel to UN peacekeeping missions in places such Cambodia, Mozambique, the Golan Heights, Timor-Leste and Haiti. As of May 2014, Japan currently has 271 JSDF personnel deployed to the UN Mission in South Sudan (UNMISS), making Japan the 45th largest troop contributor to UN peacekeeping.<sup>41</sup>

Hitherto, the policy of Japan had been to aid in UNPKOs through providing logistics support, an activity that does not in itself constitute a "use of force". In situations where international peace and security are threatened, the global community unites to respond to the problem compliant with U.N. Security Council resolution, there exist situations in which it is necessary for Japan to conduct such support activities to armed forces of other countries carrying out legitimate "use of force" based on the resolution. Yet, Japan's support activities are limited by its legal frameworks to the 'rear or non-combat area' activities to ensure that the issue of '*ittaika* with the use of force'<sup>42</sup> does not arise and operations are not struck by unconstitutionality.<sup>43</sup>

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<sup>39</sup> Aurelia George, *Japan's Participation in U.N. Peacekeeping Operations: Radical Departure or Predictable Response?*, 33 Asian Survey 560, 562 (1993), available at <http://www.jstor.org/stable/2645006>, last seen on 17/03/2015.

<sup>40</sup> International Peace Cooperation Law, 1992.

<sup>41</sup> Lisa Sharland, *Reinterpreting Article 9: enhancing Japan's engagement in UN peacekeeping*, The Strategist, Australian Strategic Policy Institute Blog, available at <http://www.aspi.org.au/reinterpreting-article-9-enhancing-japans-engagement-in-un-peacekeeping/>, last seen on 16/03/2015.

<sup>42</sup> *Ittaika* with force means meaning 'forming an 'integral part' of the use of force'. Acts that are deemed to be "*ittaika*" with the use of force by other countries, including

As a result, these constitutional restraints were cited as the cause when Japan was criticized for offering ‘too little, too late’<sup>44</sup> by way of its involvement in the Persian Gulf War. As one observer notes, Germany, which also had constitutional constraints on the use of its armed forces in both its former state as West Germany and now in its unified form, has revised its Basic Laws (Constitution) more than 40 times since 1947 in order to participate in both the North Atlantic Treaty Organization military operations and UNPKO. In contrast, Japan’s Constitution remains intact amidst all the controversies.<sup>45</sup>

The national caveats, as complained by UNO, made it difficult for Japan to fulfill core obligations of peacekeeping mandates, including protecting civilians or ensuring the safety and security of other personnel that might come under attack. This is particularly relevant in contexts such as South Sudan, where the security environment is progressively deteriorating since December 2013.<sup>46</sup>

The contradictions in Japan’s position on the right of collective self-defense are apparent in the fact that during the dispatch of the SDF to Iraq in support of reconstruction activities other militaries were required to provide perimeter defenses to Ground SDF, they were unable to use their weapons beyond the narrow purpose of defending themselves! Again when maritime SDF was sent to participate in the anti-piracy effort in the Gulf of Aden, ships were initially discouraged from using force on behalf of other coalition partners.<sup>47</sup>

In this scenario, the new interpretation comes as a relief as now not only can SDF personnel’s use weapons to protect themselves, they are also not prohibited to come to the aid of any co-operating distant unit or

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activities conducted under the U.N. or by allied countries, are interpreted as constituting a breach of the Constitution even if the acts themselves are not the use of force. See *Supra* 22.

<sup>43</sup> *Ibid.*

<sup>44</sup> See T. Shinoda, *Japan’s Response to Terrorism*, Japan Sets Out: Japan’s Role in the fight Against Terrorism, Woodrow Wilson Center for Scholars, Washington, D.C., 2001.

<sup>45</sup> Mayumi Itoh, *Japanese Constitutional Revision: A Neo-liberal Proposal for Article 9 in Comparative Perspective*, 41 *Asian Survey* 310, 313, available at <http://www.jstor.org/stable/10.1525/as.2001.41.2.310>, last seen on 14/03/2015.

<sup>46</sup> *Supra* 41.

<sup>47</sup> *Reinterpreting Japan’s Constitution*, Forbes, available at <http://www.forbes.com/sites/sheilaasmith/2014/07/03/reinterpreting-japans-constitution/>, last seen on 14/03/2015.

personnel who are under attack and remove obstacles in their missions.<sup>48</sup> It enables SDF to use weapons in actual UNPKOs as also while operating with the US in evacuating or transporting Japanese nationals from a contingency.<sup>49</sup>

Thus, SDF are more empowered in global operations now though for the time being PM Abe has shown reluctant to accept this and has assured that Japan will not join military operations under U.N. like the Gulf War. Contrary to this, Abe's own handpicked panel recommended in May 2014 in a defense report that Japan should take part in such operations.<sup>50</sup>

### ***3.2. US-Japan Mutual Co-operation Treaty***

The US-Japan treaty despite its character as a collective defense treaty, the treaty<sup>51</sup> stipulated that the obligation of collective self-defense arises when an armed attack occurs against U.S. or Japan *only* within the territories under the administration of Japan. Thus, the treaty acknowledged Japan's right to collective self-defense but restricted it to the territories administered by Japan only which is practically nothing more than exercising of right of individual self-defense.

Under the new interpretation, JSDF can now even shoot missiles targeted towards US even though they are not yet in the territory of Japan. This will strengthen the mutual trust between the two allies.

Whether Article 9 barred the right of collective self-defense or Japan chose it as a legal policy to refrain from exercising this right the recognition of the stationing of a huge army base like that of US in its territory was itself as an acknowledgement of this right.<sup>52</sup> In fact, going by the definition of 'Acts of Aggression' given by the UN General Assembly, it *per se* constituted an act of aggression even if JSDF themselves did not indulge in the aggressive acts.<sup>53</sup> While this expansion

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<sup>48</sup> *Second Report of the Advisory Panel on Reconstruction of the Legal Basis for Security* (15/05/2014), available at [http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku\\_en.pdf](http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf), last seen on 16/03/2015.

<sup>49</sup> *Supra* 47.

<sup>50</sup> *Supra* 27.

<sup>51</sup> US-Japan Treaty of Mutual Cooperation and Security, 1960.

<sup>52</sup> T. Matsuda, *The Japan-US Security Treaty and Japanese Laws*, 39 *Japanese Annual of International Law* 85, 86 (1996).

<sup>53</sup> The elements contained in the use of armed force within the meaning of Article 2 (4) of the U.N. Charter are in fact not limited to actual exchange of shots. Article 3(f) of

of right of 'self-defense' may be well within the four-corners of Article 9 so long as its exercise is for defending either nations, a real legal issue may arise as despite the limitations of Article 9 acknowledged in the guidelines<sup>54</sup>, they give ample scope for abuse of JSDF against the constitutional limit.

An extended exercise of self-defense may go to the roots of Article 9 in case of a Chinese attack on Taiwan or an attack short of invasion which may well qualify as situation in surrounding areas of Japan.

The most controversial and obvious example of the over-expansion of the right of self-defense is the dispatch of three SDF warships to Diego Garcia in Indian Ocean to support US led military operations in Afghanistan. Apparently the step was taken as Japan's 'own initiative towards the eradication of terrorism, in cooperation with the United States'<sup>55</sup> and in absence of any specific authorization by the U.N. Security Council of the use of armed force. Thus the only possible explanation to it can be an exercise of collective self-defense if not an act of aggression. Also, it seems more likely that this step was taken as a response to the U.S. call for cooperation outside the treaty framework. It is obvious in this respect that this action dramatically deviated from Japan's policy hitherto, formalistic or substantive, on the exercise of the right of collective self-defense. This act could well be argued to be an unconstitutional one in absence of any amendment in Article 9 to reflect the liberal interpretation justifying fully the exercise of the right of collective self-defense.

Nevertheless, by adopting the new liberal interpretation, GOJ has authorized itself to do the same and similar in future without amending constitution.

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the GA Resolution 3314 (XXIX) defines an act of aggression *inter alia* as "The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State." See U.N. Doc. A/Res/3314 (XXIX) (14 December 1974).

<sup>54</sup> Section II (2), Japan-US Joint Statement on Review of Defense Cooperation Guidelines, 1997.

<sup>55</sup> Junichiro Koizumi, Prime Minister of Japan, Opening Statement at Press Conference (19/09/2001) in E.J.L. Southgate, *Comment: From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, 151 *University of Pennsylvania Law Review*, 1620 (2003), available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3221&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3221&context=penn_law_review), last seen on 14/03/2015.

### ***3.3. Effects on the East Asian Peace and International Relations***

The new interpretation was expected to bring Japan at par with the world in its exercise of defensive rights. But the scope interpretation is still a bit restricted. Unlike Article 51 which provides nations with the inherent right to come to the aid of allies even if the states themselves are not directly threatened, the reinterpreted Article 9 only allows Japan to defend allies if “the attack on that country poses a clear danger to Japan’s survival or could fundamentally overturn Japanese citizens’ constitutional rights to life, liberty and the pursuit of happiness, there is no other way of repelling the attack and protecting Japan and its citizens and the use of force is limited to the minimum necessary”.<sup>56</sup>

The final draft of the Cabinet document said Japan could intervene militarily “when an attack on a country that ‘has close relations’ with Japan ‘poses a clear danger of threatening our country’s existence and fundamentally overthrowing our people’s lives, freedom and right to pursue happiness’”.

A controversy may therefore arise if China attacks Taiwan. Taipei is certainly the most close and friendly nation to Japan. If China occupies Taiwan it would certainly be a threat to Japan as the *Senkaku* islands are roughly half the distance from Taiwan as they are from mainland China, allowing China to attack more forcefully on them. China could also then approach the islands from two different directions. Furthermore, Taiwan’s strategic location would greatly enhance China’s ability to interdict maritime shipping to and from Japan. The only way then to repel approaching Chinese attack on Japan would be to intervene on behalf of Taipei. Anyway, if US were to join the battle, Japan, in order to defend US vessels would have to join the fight.<sup>57</sup> The peculiarity of this situation would be that under black-letter international law, Japan cannot use military force in Taiwan *sans* China’s consent, even if the Taiwan government requests its assistance. That’s because the Article 51 of UN Charter only authorizes an act of “collective self-defense if an armed attack occurs against a Member of the United Nations.” Taiwan is not a UN member and Japan itself recognizes the government in Beijing as the rightful government of China, and that Taiwan is a part of

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<sup>56</sup> *Supra* 27.

<sup>57</sup> Zachary Keck, *Taiwan and Japan’s Collective Self-Defense*, *The Diplomat* (02/07/2014), available at [http://thediplomat.com/2014/07/taiwan-and-japans-collective-self-defense/#disqus\\_thread](http://thediplomat.com/2014/07/taiwan-and-japans-collective-self-defense/#disqus_thread), last seen on August 15/03/2015.



China.<sup>58</sup> So unless Japan is able to plausibly claim that an attack on Taiwan triggers Japan's own inherent self-defense right, and unless a Chinese invasion could be said to justify humanitarian intervention, Japan would violate the U.N. Charter if it used military force in a way that violated the territorial integrity of another UN member (China).<sup>59</sup>

This is but one instance. Any similar disturbing act of aggression or anything short of it in the North East Asian Region would require Japan to take some stance. In that case, it may by virtue of the new interpretation come forward to the aid of the ally provided it satisfies the three caveats attached and discussed above.

### ***3.4. Surging Threat of Terrorism and Japan***

Japan's Anti Terrorism Special Measures Law came in the wake of the 9/11 attack under U.S. influence. Prior to this, the Situations in Areas Surrounding Japan Act, 1999 dealt with situations requiring Japanese defense aid. However, this law only covered the surrounding states, hence new law was passed.<sup>60</sup> This law was the first to allow SDF to operate on foreign soil. Passed in furtherance of UN Security Council resolution 1368, 1267, 1269 and 1333, it was purported to enable Japan to contribute actively and on its own initiatives to the efforts of the international community for the prevention and eradication of international terrorism, thereby ensuring the peace and security of the international community including Japan.<sup>61</sup> Even then there were caveats that such measures must not constitute the threat or use of force, they must be restricted to search and rescue, cooperation and support, assistance to people and such combative activities only<sup>62</sup> and that too only by way of proportional use of weapons in case of unavoidable cause<sup>63</sup>. Subsequently, Maritime SDF supply vessels and destroyers were

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<sup>58</sup> Julian Ku, *Why Japan Would Violate International Law If It Militarily Intervened to Defend Taiwan (But Why Japan Should Do So Anyway)?*, *OpinioJuris* Blog(10/07/2014), available at <http://opiniojuris.org/2014/07/10/japan-violate-international-law-militarily-intervened-defend-taiwan-anyway/>, last seen on 10/03/2015.

<sup>59</sup> *Ibid.*

<sup>60</sup> See *Report on Article 9 of the Constitution of Japan*, Law Library of Congress, available at <http://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf>, last seen on 11/03/2015; also see *Japan's Efforts based on Anti-Terrorism Special Measures Law*, Ministry of Foreign Affairs, Japan, available at <http://www.mofa.go.jp/policy/terrorism/effort0510.html>, last seen on 10/03/2015.

<sup>61</sup> Art. 2, The Anti-Terrorism Special Measures Law.

<sup>62</sup> Art. 3, The Anti-Terrorism Special Measures Law.

<sup>63</sup> Art. 10, The Anti-Terrorism Special Measures Law.

dispatched to the Indian Ocean to provide assistance to combat forces. Air Self-Defense Force cargo planes transported supplies for U.S. forces overseas, to places such as Guam. At the same Diet session, two other pieces of legislation which enhance Japan's defense ability were enacted. The Japan Coast Guard was authorized to fire on suspicious vessels, if necessary, in order to search them in Japanese waters. Another act also allowed the SDF to help guard U.S. military bases inside Japan.<sup>64</sup>

1997 guidelines issued consequent to the U.S. Japan Joint Declaration of 1996 brought a landmark shift in Japan's defense policy much to the discomfort of its neighbors. It *inter alia* provided for SDF intervention in areas surrounding Japan in the form of co-operating with U.S. This marked the end of 'Japan' oriented approach under the Article 5 of U.S. Japan Security treaty. The scope of 'areas surrounding Japan' was kept diplomatically ambiguous by not precisely stating which surrounding areas are to be covered.

Since then the Japanese approach towards dealing with contingency had been a very *ad hoc* one. Authorizing laws were required to empower SDF to implement the new guidelines; various laws were enacted to deal with different contingency situations and these were increasingly wider in scope. Some of these laws like the Law Concerning Ensuring National Independence and Security in a Situation of Armed Attack, 2004, also covered 'terrorism' *inter alia* as one of the contingencies requiring Japan to extend SDF cooperation.<sup>65</sup>

On the international front, Japan has been collaborating with various nations in the global fight against terrorism. In 2003, Japan and Australia adopted a joint statement on cooperation to combat international terrorism which covered various activities including particularly immigration and border controls, transport security, anti-terrorist financing, including support for the establishment and operation of effective Financial Intelligence Units in countries in the region, cyber security and critical infrastructure protection and counter-terrorism aspects of APEC's Energy Security Initiative.<sup>66</sup>

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<sup>64</sup> Supra 60.

<sup>65</sup> See William C. Middlebrooks Jr., *Beyond Pacifism: Why Japan Must Become a Normal Nation?*, 43-47 (1st ed., 2008); See Supra 60.

<sup>66</sup> *Australia-Japan Joint Statement on Cooperation to Combat International Terrorism*, Ministry of Foreign Affairs, Japan, available at <http://www.mofa.go.jp/region/asia-paci/australia/pmv0307/terrorism.html>, last seen on 19/03/2015.

Notwithstanding these efforts, Japan has largely been insulated from international terrorism in the past decade and radical Islam has little or almost nil hold in the country.<sup>67</sup> However, the recent killing of two Japanese citizens by the ISIS and the declaration by PM Abe not to succumb to these threats and actively work against terrorism has reignited the need for revising the security policy.

It has been about 70 years since the formation of the United Nations and there are no real prospects of having a formal UN force to deal with global security threats like terrorism. On the other front, Japan's relations with the Middle East are becoming more central — and controversial. Being a resource-poor country, it is one of the largest importers of crude oil from the region. Political stability in the Middle East is in Japan's own interests. Consequently, during his recent visits to Egypt, Jordan, Lebanon, Israel and Palestine, PM Abe pledged \$200 million in non-military aid and promised humanitarian and infrastructure assistance for countries fighting ISIS and terrorism as well as for refugees displaced from Syria and Iraq following ISIS activity. These attempts to gain prominence on the international stage by playing a bigger role in the West's counter-terrorism policy, have stimulated strong reactions from IS reflected in the outrageous beheadings.<sup>68</sup> Considering that many Japanese nationals are actively working overseas and face risks of being involved in emergency situations such as terrorism, it is necessary to enable the rescuing of Japanese nationals abroad by use of weapons subject to the consent of acceptance from the territorial State which, under international law, has the obligation to extend protection to foreigners who are within its territories.<sup>69</sup>

In light of these, the newly empowered SDF may prove helpful in coping with the hovering threat of global terrorism over Japan.

#### 4. CONCLUSION

Needless to say, absolute non-armament is a utopian ideal and a blanket ban on the maintenance of any armed force even for the purpose of

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<sup>67</sup> *Terrorism Threatens Japan*, The Hindu (04/02/2015), available at <http://www.thehindu.com/opinion/editorial/editorial-terrorism-threatens-japan/article6853387.ece>, last seen on 10/03/2015.

<sup>68</sup> Ibid.

<sup>69</sup> Supra 5.

national self-defense, while acknowledging its military and tactical consequences, would oblige the Japanese people to fall into the same absurdity as absolute and blind trust in the *'justice and faith of the peace-loving peoples of the world'* would lead to. This would, contrary to the principle of effective interpretation, rather nullify the purposes and spirit of Article 9 as well as the preamble of the Japanese Constitution which recognizes the *'right of all people of the world to live in peace, free from fear and want'*. Therefore, effective interpretation necessitates Japan to possess certain level of military strength by virtue of its right to live in peace as embodied in its preamble and Article 9 of the Japanese Constitution itself. The journey from no defense to self-defense to collective self-defense to pro-active collective self-defense has seen a lot of twists and turns; the latest one being the July 2014 resolution by Abe government. While there are apprehensions amongst neighbours, Japan is being very calculative in expressing the complete scope of its new defensive power. Stimulated by contemporary needs, Article 9 as well as nuances of 'war', 'security risk' and 'self-defense' are evolving continuously.

While new interpretation stimulates political unrest in the region, it also widens scope for more direct and active cooperation from JSDF in UNPKOs. It enables Japan to fulfill its international obligation under UN Charter and enhances the scope of US-Japan treaty. Up till now, Japan could only defend US vessels and army only when the right of individual self-defense or reflex effect of self-defense extended. Now it can pro-actively act including shooting down ballistic missiles on its way towards US. However, this also opens up possibilities of Japan being dragged into US-led strategic wars. The East Asian peace and international relations are affected as the interpretation comes in wake of changing power equations in the region. Japan can now come to the aid of an 'ally' though the language of resolution give ample scope for further 'interpretation' of terms like 'friendly nation', 'minimum necessary force', 'Japan's survival' etc.

Hitherto, the interpretations have brought Japan nearer to the international law standards. But the road to interpretation is an endless journey – a maneuvering tool for the political parties, an uncertain international stand which can be reversed with a change in ruling power. This is even more probable for Japan with its strong popular opposition to and abhorrence for militarization. Japan has seen two self-immolation attempts in opposition to the new resolution. Recent beheading of two Japanese citizens by ISIS and its later threat to Japan which comes within a year of the new interpretation would increase public

apprehension but at the same time it makes it even more imperative for Japan to be ready to cope with any extremist threat. To amend the Constitution would be a more stable and definitive approach but the requirement of ratification by majority of people in addition to two-third majority in diet makes it easier said than done. Given an opportunity to vote, people would defend their cherished pacifism. Therefore the convenient way to enable pro-active militarization is to 'interpret' Article 9 in a liberal way. How far this interpretational approach is justifiable – that is Japan's internal constitutional debate. For the international community, what is of prominence is the increased Japanese contribution towards world peace, the changing power dynamics in the East Asian region and rise of a potentially strong and capable opponent to global terrorism. To hope that shutting eyes towards global threats to peace and hiding behind the shield of absolute pacifism or even restricted armament would reciprocate world peace is to bury head in the sand. Force is necessary to counter extremism and keep the peace stable. In wake of this, Japan's shift towards militarization is a welcome move. Germany realized this need long back and it is about time that Japan does that too.

That understood, it will be commendable if Japan does this in a more stable way. Moulding public opinion would be difficult but interpreting where amendment is required is susceptible to unconstitutionality. Even though Courts in Japan have hitherto excused themselves from deciding upon the constitutional vires of Article 9 definitively, it is only a matter of time before the interpretation becomes too farfetched to appear within words and spirit of Article 9. Therefore while the end result is laudable, the means are recommended to be constitutionally entrenched firmly. The expectant eyes of the global community are now on Japan for better contribution towards establishment and maintenance of international peace. But a caveat attaches to the interpretational route. While there are scopes of opening up rightful path to international peace and national security, it may also open up channels of gross abuse of self-defense ultra vires not only to the constitution but also to the international law.