JAPAN'S RIGHT TO FIGHT TERROR

JENNIFER ARBAUGH

I. INTRODUCTION

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.¹

Since its drafting in 1947, this seemingly simple provision of the Japanese Constitution has had more written on it by Japanese scholars than any other constitutional provision.² As a condition of Japan's surrender following World War II, the United States occupied Japan and sought to create a democratic state that would support the United States in its efforts to contain the Soviet Union and Communism.³ In addition, the Allied powers sought to destroy Japan's ability to wage war following the devastation of World War II.⁴ The Japanese Constitution also uniquely puts Japan under control of the United Nations, which is a world government.⁵

Over time, this pacifist mindset has firmly entrenched itself into the culture of modern Japan.⁶ In fact, a large number of Japanese have pride in what Article 9 stands for, and many have internalized these pacifist ideals over time.⁷ Many believe that Article 9 has been the "single most determining factor which has kept Japan peaceful."⁸ Some believe that Article 9 has prevented Japan from sharing in its part of responsibility in the world.⁹ They believe this provision has prevented Japan from being a "normal" state, and that it is humiliating that Japan has to serve in a supporting logistical role in global conflicts due to the limits of their constitution

¹ NIHONKOKU KENPO [KENPO] [Constitution], art. 9 (Japan).
³ Id.
⁴ Id.
⁵ D. Bradley Gibbs, Comment, Future Relations Between the U.S. and Japan: Article 9 and the Remilitarization of Japan, 33 HOUS. J. INT'L L. 137, 141 (2010).
⁶ Panton, supra note 2, at 131.
⁷ Id.
⁸ Id.
⁹ Panton, supra note 2, at 131.
and Article 9. In fact, Article 9 could be said to prevent Japan from attaining the status of a great world power.

For the first time since Japan’s surrender in World War II, Japan dispatched lightly armed forces in 2001 to foreign lands, including Afghanistan and Iraq, following the rules of engagement. But Japanese forces assisted in the war on terror by helping with reconstructive efforts in Iraq, not engaging in military battle. The war against terror has led many countries to view preemptive strikes as permissible, especially in cases involving non-state entities, such as terrorists, and states where there is a risk of terrorists acquiring weapons of mass destruction. In December 2002, President Bush stated that “because deterrence may not succeed, and because of the potentially devastating consequences of WMD [weapons of mass destruction] used against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures.” This claim of a right to preemptive self-defense provokes anxiety amongst many international lawyers. Concerned lawyers fear that a claim of preemptive self defense legitimizes massive military actions, such as Pearl Harbor, that seem to come with little warning and in the absence of war with a goal of eliminating any potential or latent adversaries. Since American academics suggested this strategy towards China during the Cold War, anxiety about preemptive self-defense is not unfounded.

This Article begins by examining the history of the pacifist Article 9, from Japan’s surrender at the end of World War II through the present day state of Article 9 in Japan. Following this history, interpretations of Article 9 are examined, looking at how the Japanese legislature attempted to justify its creation of the Japanese Self Defense Force and the Japanese Supreme Court’s reluctance to deal with Article 9. Following this background, the discussion turns

---

10 Id.
11 See Malcolm Cook & Andrew Shearer, Going Global: A New Australia-Japan Agenda for Multilateral Cooperation, The Lowey Institute for Int’l Pol’y: Perspectives 3 (2009), http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots951=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=100188 (discussing how Australia and Japan does not have international influence due to a lack of economic, political, and military support).
13 Id. at 131.
15 Id. at 530.
16 Id. at 525.
17 Id.
18 Id.
19 See infra notes 24-53 and accompanying text.
20 See infra notes 54-79 and accompanying text.
to the evolution of the Japanese Self Defense Force and the U.S.-Japan Security Arrangement. Finally, this Article examines Japan’s role in the war on terror over the last decade, as well as the doctrine of preemptive self-defense and how this doctrine has reared its head through the war on terror. The Article concludes that Japan has not violated Article 9 by their participation in a preemptive war on terror with the United States based on an interpretation of Article 9, the broad acceptance of preemptive self-defense around the world, and the way terror changed the battlefield.

II. BACKGROUND

A. THE HISTORY BEHIND THE PACIFIST ARTICLE 9

The uniquely pacifist Japanese Constitution became effective on May 3, 1947, following the surrender of Japan in World War II. While there are other state constitutions that disavow using war in international relations, Japan’s constitution is unique in forbidding Japan from having a military or the right of war. After surrendering in World War II, the Allied Powers occupied Japan after Japan’s acceptance of the terms stated in the Potsdam Declaration. The principle aim in occupying Japan was demilitarizing Japan, which led to the writing of Article 9. General MacArthur (“MacArthur”), Supreme Commander for Allied Powers (“SCAP”), administered the occupation, and he sought to establish a government that was both peaceful and responsible through two components: eliminating any potential for Japanese society to remilitarize and establishing democratic order in Japan with total repudiation of the Meiji era feudal order. General MacArthur urged the government of Japan to amend the constitution in effect at the time, the Meiji Constitution.

The Japanese cabinet attempted to revise the Meiji Constitution to bring it in line with the goals of the Occupation. However, the Higashikuni cabinet was unable to create a satisfactory revision for MacArthur. As a result, MacArthur tasked the SCAP’s

21 See infra notes 80-112 and accompanying text.
22 See infra notes 113-151 and accompanying text.
23 See infra notes 152-200 and accompanying text.
26 Umeda, supra note 19, at 10.
28 Id. at 1606-7.
29 Umeda, supra note 19, at 4.
30 Southgate, supra note 22, at 1607.
31 See generally SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN: SEPTEMBER 1945 TO SEPTEMBER 1948
Government Section with creating a new constitution that contained the necessary components to make Japan both peaceful and responsible. General MacArthur required that SCAP include the following three principles in the new Japanese constitution: “a new Emperor system; renunciation of war; and the end of the feudal system.” General MacArthur was the first to write that the new constitution of Japan should renounce war. Despite concerns in the Japanese government to having a constitution that was drafted by foreigners, Japan had little choice in the matter due to their unconditional surrender in World War II.

Initially, MacArthur requested that Article 9 in the Japanese constitution contain the language “even for preserving its own security.” The Japanese government omitted this language during revisions; however, it adopted the article with only small changes. While the contents of Article 9 shocked the Japanese, MacArthur pushed for the adoption of the constitution; therefore, there was little the Japanese government could do but accept Article 9 as drafted.

Following the drafting process, a Special Committee on Revision of the Imperial Constitution received the draft in June of 1946. The job of this Committee was to “Japanize” the text prior to the Diet (the Japanese legislature) receiving the draft for approval. In this Committee, the Chairman revised Article 9 with two significant additions, creating the ambiguities that would be exploited in the future by the Diet to justify their Self Defense Forces (“SDF”). The Japanese SDF is an armed organization, which maintains the “minimum level of armed strength” necessary for self-defense. The first amendment made by the Chairman added the text “aspiring sincerely to an international peace based on justice and order” to the beginning of the first paragraph. In doing so, the goal of Article 9 changed from one of the constitution being imposed on Japan to reflecting Japan’s own desire to foster peace and justice. Additionally, the Committee amended the second paragraph to read “in order to achieve the aim of the preceding paragraph.” This amendment changed Article 9’s purpose from an outright

VOLUME I 99-101 (1949) (noting the cabinet made minor changes to the constitution and retained the Emperor system).

32 Southgate, supra note 22, at 1607.
33 Umeda, supra note 19, at 6.
34 Id.
35 Id.
36 Southgate, supra note 22, at 1608.
37 Id.
38 Id.
39 Id. at 1609.
40 Id.
41 Id.
43 Southgate, supra note 22, at 1610; see also KENPO art. 9.
44 Southgate, supra note 22, at 1610.
45 KENPO art. 9
renunciation of war to only rejecting war merely as a policy tool. As a result of these amendments, later interpretations of Article 9 only denoted Japan war potential for offensive purposes.

Several countries voiced concerns over these amendments, however MacArthur believed there was sufficient protection in the constitution to preclude future rearmament and remilitarization of Japan. Such constitutional protections included universal suffrage in Article 15 and the requirement in Article 66 that Ministers of State and the Prime Minister be civilians. However, Japan’s neighbors remembered the brutal imperialism and actions taken by Japan against their countries during World War II, and they remain suspicious and nervous of Japan’s rearmament even to this day.

Over the years, no amendments have ever been made to the constitution. In fact, the framers intended that it would be extremely difficult or nearly impossible to amend the constitution through Article 96. Article 96 requires that an amendment be made by an affirmative vote of two-thirds in both houses of the Japanese Diet and ratification be made by a majority. However, Article 96 does not prevent numerous interpretations of the constitution’s provisions by legislatures, academics, and the Japanese government.

B. Playing the Interpretation Game with Article 9

Interpretations of Article 9 by the Japanese government, international organizations, and academics have varied widely from those who believe it expresses absolute pacifism to those who believe it allows for at least a right to self defense. The interpretations change and adapt in relation to changes in the United States’ policy towards Japan, as well as international situations that surround Japan. As a result, Japan interpreted its constitution as providing for a Self Defense Force (“SDF”). Currently, Japan has a Ground Self Defense Force, Maritime Self Defense Force, and Air Self Defense Force.

---

46 Southgate, supra note 22, at 1610.
47 Id.
48 Southgate, supra note 22, at 1611.
49 Id.
51 Gibbs, supra note 5, at 141.
52 Southgate, supra note 22, at 1602.
53 Id.; see also KENPO art. 96.
54 See Gibbs, supra note 5, at 141 (noting that lack of amendments has led to flexible interpretations of the articles).
55 Umeda, supra note 19, at 2-3.
56 Id. at 8.
57 Id. at 1.
58 Id.
A right of self-defense is a cornerstone in international law, written in Article 51 of the Charter of the United Nations (“UN Charter”) as well as in several Security Council Resolutions, which are legally binding when issued under Chapter VII. For example, resolutions following the terrorist attacks of 9/11 addressed the right to self-defense. In particular, Security Council Resolution 1373 (2001), stated the following rights to self-defense of any sovereign nation:

*Reaffirming* further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

*Reaffirming* the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations are reiterated in resolution 1368 (2001),

*Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts....

In addition to the UN Charter, the International Court of Justice stated that the individual or collective right to self-defense is established in customary international law.

On its face, it appears the Japanese gave up these rights in their Constitution, stating that the Japanese “renounce war as a sovereign right of the nation....” However, while Article 9 explicitly prohibits any buildup of a military, the Japanese legislature believes that the inherent ambiguities written into Article 9 justify Japan’s interpretation of an implied right to have a SDF. The legislature interprets war to mean an aggressive or offensive act; therefore acting in self-defense allows legislators to sidestep the constitution. Interpretation of Article 9 in this manner would logically allow the SDF to actually defend Japan.

While discussions have suggested it is time to amend Article 9 and allow Japan to remilitarize, safeguards placed during drafting keep the constitution of Japan as the supreme law of the nation.

---

60 *Id.*
61 *Id.*
63 See *KENPO*, art. 9 (discussing the renouncement of war).
64 Southgate, *supra* note 22, at 1601-2.
65 *Id.* at 1602.
66 *Id.*
67 Gibbs, *supra* note 5, at 137; see also *KENPO* art. 98 (noting the constitution is the supreme law of land and shall be faithfully observed).
previously mentioned, significant hurdles are present in attempting to revise Article 9, which makes it nearly impossible to change the Japanese Constitution. 68 In fact, since the Japanese Constitution has never been amended, there is uncertainty about what the process would even be. 69 Any attempts at revision would be the responsibility of the Diet. 70 With the recent rise of the Democratic Party of Japan, the new administration desires closer ties with Asian countries, such as China and South Korea, which will slow the efforts to revise the constitution. 71 Currently, given the state of the economy, economic recovery takes precedent over any attempts to amend the constitution. 72

As an advocate for amending the Japanese constitution, the United States supports revising Article 9, hoping Japan will take over more of its own defense and assist with initiatives worldwide. 73 In addition, the United States favors efforts towards remilitarization, due to the U.S. military's resources being spread thin over the past decade. 74 The United States has limited resources and cannot afford the burden of protecting and defending Japan as it has in the past, so the United States believes it is time for Japan to carry more of the burden for its defense. 75

As the court of last resort, the Japanese Supreme Court has "the power to determine the constitutionality of any law, order, regulation or official act." 76 However, the Supreme Court has shown a reluctance to issue an opinion on Article 9 and the creation of the SDF. 77 For example, in the Nagunuma case, the Supreme Court stated that determining the SDF's constitutionality was not within the scope of judicial review because it involved a political judgment. 78 The Japanese Supreme Court showed extreme deference towards the Diet, primarily due to the political question doctrine. 79 As a result, the Court continues to resolve any constitutional questions on very narrow grounds. 80

C. EVOLUTION OF THE JAPANESE SELF DEFENSE FORCE AND THE UNITED STATES-JAPAN SECURITY ARRANGEMENT

General MacArthur quickly found that if Article 9 were interpreted literally to require total disarmament and

---

68 Southgate, supra note 22, at 1602.
69 Panton, supra note 2, at 132.
70 See KENPO art. 96 (noting that the Diet initiates amendments to the Constitution).
71 Panton, supra note 2, at 132.
72 Panton, supra note 2, at 133.
73 Panton, supra note 2, at 131.
75 Gibbs, supra note 5, at 154.
76 KENPO art. 81.
77 Gibbs, supra note 5, at 147.
78 Gibbs, supra note 5, at 148.
79 Southgate, supra note 22, at 1624.
80 Id. at 1624-25.
demilitarization, he would live to regret the article.\textsuperscript{81} With the outbreak of war on the Korean peninsula in 1950, Japan found itself largely undefended due to SCAP forces being sent to Korea.\textsuperscript{82} MacArthur feared Japan could be destabilized due to his army’s absence and Communist aggression.\textsuperscript{83} In fact, MacArthur feared the Soviet Union might attempt to invade Japan from the northern island of Hokkaido.\textsuperscript{84} Therefore, although initially resisted by the Japanese, MacArthur authorized the creation of a National Police Reserve of 75,000 to safeguard Japan’s internal security.\textsuperscript{85} In creating the National Police Reserve, MacArthur also argued that the intent of Article 9 was never the complete demilitarization of Japan because Japan always possessed an inherent right to self-defense as a sovereign nation.\textsuperscript{86} During the revisions of the drafted Japanese constitution, the Japanese government specifically omitted the text that had stated “even for preserving its own security.”\textsuperscript{87}

With increasing unrest in Asia and widespread Communist activity, U.S. policy makers felt Japan was important to U.S. interests in Asia.\textsuperscript{88} The United States pressured Japan to begin rearming, but Japanese officials resisted rearmament in the name of their new pacifist constitution.\textsuperscript{89} In 1951, the Peace Treaty of San Francisco ended the occupation of Japan by the Allied Powers.\textsuperscript{90} Japan began creating collective security arrangements—one of which was promptly created with the United States.\textsuperscript{91} The treaty stated that Japan had an inherent right of self-defense, both individual and collective, as stated in Article 51 of the UN Charter.\textsuperscript{92}

In the Security Treaty of 1951 between Japan and the United States, the United States agreed to maintain forces in and around Japan for security purposes.\textsuperscript{93} In addition, Japan agreed to assume increased responsibility for its own self-defense in addition to the U.S. troops in Japan deterring attacks.\textsuperscript{94} By 1954, the Japanese had ultimately combined the air and maritime branches of their forces

\begin{footnotesize}
\begin{enumerate}
\item Southgate, supra note 22, at 1612.
\item Id.
\item Id.
\item Umeda, supra note 19, at 11.
\item Southgate, supra note 22, at 1612.
\item Southgate, supra note 22, at 1611.
\item Southgate, supra note 22, at 1608.
\item Gibbs, supra note 5, at 145.
\item Id.
\item Southgate, supra note 22, at 1613.
\item Gibbs, supra note 5, at 146.
\item See id. at art. 3 (stating that Japan and the United States will maintain and develop the ability to resist armed attacks).
\end{enumerate}
\end{footnotesize}
into the Self Defense Force. Technically, the troops remain civilians as mandated by the law that established the SDF.

In 1960, the U.S.–Japan Treaty of Mutual Cooperation and Security created a “more equitable relationship” between Japan and the United States than had existed under the 1951 agreement. Throughout the 1960–70s, opposition continued in Japan over the alliance with the United States; however, by the 1980s support for the United States–Japan alliance emerged. As a result of this treaty, guidelines are issued periodically to further demonstrate the commitment of Japan and the United States to one another and to clarify the provisions of the Treaty of Mutual Cooperation and Security. Most recently, due to the increasing tensions between North and South Korea, the guidelines expanded not only to include Japan but “areas surrounding Japan” as part of its right of self-defense. Depending on the situation, if an event is believed to have an influence on the peace or security of Japan, the SDF may become involved. Many of Japan’s neighbors in Asia believe that this option is too open-ended and are uncomfortable with this guideline.

Over the years, primary responsibility for all Japanese defense operations has increasingly fallen to the SDF, with the United States decreasing their involvement due to the costs involved and the desire to stay out of conflicts that the United States does not start. In addition, the SDF may take cooperative measures with the United States in two categories: (1) cooperative actions or unilateral actions that are taken by either government, including search and rescue operations, relief activities, refugee activities, etc; and (2) supporting U.S. military operations both in Japan and its surrounding areas. As a result of the relationship with the United States, Japan basically acquired just enough capabilities in basic defense to repel potential aggressors, but no more.

During the Gulf War, Japan refused to participate in the conflict, citing Article 9 as the reason. The Japanese Supreme Court, as previously discussed, shows deference towards the legislature and considers the SDF a political question.

---

95 Southgate, supra note 22, at 1614-5.
96 Teslik, supra note 68.
97 Southgate, supra note 22, at 1615.
98 Gibbs, supra note 5, at 148.
100 Southgate, supra note 22, at 1617.
101 Id.
102 Id. at 1618.
103 Id. at 1617.
104 Southgate, supra note 22, at 1618.
106 Southgate, supra note 22, at 1622.
107 Id. at 1624.
refused to interpret Article 9 broadly enough to allow for Japan’s participation in a conflict in the Middle East; the Diet limited the country’s involvement to giving money to the efforts.\textsuperscript{108} International criticism followed Japan’s decision, with Japan being said to have engaged in “checkbook diplomacy.”\textsuperscript{109} Foreign critics believed Japan had done “too little too late” in the Middle East, contributing money to the coalition and then dispatching only after combat operations were complete.\textsuperscript{110} Despite the negative attention Japan received in the international field, this still was not enough for Japan to change its policy.\textsuperscript{111} The Prime Minister at the time, Kaifu, attempted to extend Article 9’s meaning to cover the Gulf War conflict by having the cabinet rule that SDF participation could be used to enforce sanctions on Iraq.\textsuperscript{112} However, Prime Minister Kaifu was not able to gain the support of the legislature due to immense public pressure indicating that action in the Gulf War would have a negative impact on Article 9.\textsuperscript{113}

D. Japan’s Role in the War on Terror

Under the security agreement previously discussed, the U.S. and Japanese militaries agreed to participate in bilateral defense and assist each other should an attack occur on Japan or in any surrounding areas.\textsuperscript{114} The Japan–United States Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines limit the contributions of the SDF, essentially limiting them to non-offensive tasks such as rear-area support or information gathering.\textsuperscript{115} However, since the end of the Occupation, Japan continues to take steps toward strengthening its military.\textsuperscript{116} This is perhaps due to the fact that many in Japan realize that Japan cannot afford to continue living in a “closed space.”\textsuperscript{117} The primary reason Japan desires remilitarization is due to the “rough neighborhood” that Japan finds itself in, with China and North Korea nearby.\textsuperscript{118} Perhaps most alarming is the ongoing situation and international relations with North Korea, who continues to provoke the international community and develop nuclear weapons.\textsuperscript{119}

Beginning with the financial package in the Gulf War in 1990 previously discussed, Japan’s involvement in international affairs has

\textsuperscript{108} Id. at 1622.
\textsuperscript{109} Panton, supra note 2, at 135.
\textsuperscript{110} Southgate, supra note 22, at 1631.
\textsuperscript{111} Panton, supra note 2, at 135-6.
\textsuperscript{112} Id. at 135
\textsuperscript{113} Id.
\textsuperscript{114} See generally Security Treaty Between the United States and Japan, U.S.-Jap., Sept. 8, 1951, 3 U.S.T. 3329 (stating that the parties will consult with each other should an armed attacked occur in Asia).
\textsuperscript{115} Southgate, supra note 22, at 1604-5.
\textsuperscript{117} SAMUELS, supra note 98, at 2.
\textsuperscript{118} Teslik, supra note 89.
\textsuperscript{119} See id. (noting a primary concern is North Korea’s recent actions).
In 1992, Japan passed legislation allowing its soldiers to assist with UN Peacekeeping Missions. Following the passing of this legislation, the first deployment of troops to a foreign country since World War II occurred when Japanese troops participated in a UN Mission to Cambodia. Following the events of 9/11, former Prime Minister Koizumi pledged Japan’s support towards the United States, and the Japanese cabinet began looking for a way to provide support using their SDF without violating the constitution. The United States sought the assistance of Japan in the war on terror, telling the Ambassador from Japan to “show the flag” to express cooperation. The efforts concluded with the Anti-terrorism Special Measures Law. The law circumvented Article 9 by allowing Japan to dispatch its SDF to foreign soil with the prior consent of the foreign government to assist with noncombatant and humanitarian support.

In 2001, the Diet created and approved the Anti-Terrorism Special Measures Law, allowing the SDF to support the United States in the war on terror in an overseas noncombat capacity. In November 2011, the SDF sent warships to the Indian Ocean to support the U.S. Operation Enduring Freedom, marking the first time combat theater operations were conducted by the Japanese navy overseas since 1945. From 2001 to 2007, the SDF assisted with providing fuel to ships located in the Indian Ocean during the war in Afghanistan.

The Special Measures Law allows the SDF to support U.S. activities such as supply, transportation, and medical aid. In addition, the law authorizes the SDF to support these activities in the territory of a foreign state and on the high seas with the approval of the foreign state. While this law allows the SDF to be more proactive in their defense, it still must operate in areas that are not designated to be “combat” zones. The departure of Japanese troops to the Afghani theatre has arguably departed from the previously discussed guidelines to the U.S.–Japan Security Treaty that stated that for the SDF to be involved, the conflict should be in an area

120 Kaufman, supra note 108, at 266.
121 Id.
122 Id. 267.
123 Southgate, supra note 22, at 1619-20.
124 Umeda, supra note 19, at 22.
126 Umeda, supra note 19, at 22.
127 Southgate, supra note 22, at 1601.
128 Southgate, supra note 22, at 1599.
130 The Anti-Terrorism Special Measures Law: Tentative English Summary, supra note 118.
131 Id.
132 Southgate, supra note 22, at 1621.
surrounding Japan. Some have even argued it is a material breach of the constitution because deploying troops violates the prohibitions outlined in Article 9. Japan’s neighbors viewed the deployment of troops unfavorably and believed that Japan made a dangerous step towards future militarization and aggression. In passing the Anti-Terrorism Special Measures Law, the Japanese government required the SDF to conduct their operations in non-combat zones, with security of their troops being assured. By operating in non-combat zones completing support activities, the Diet hoped to assure the Japanese that this law would not go too far in removing the constitutional restraints towards remilitarization. However, many scholars also question whether there truly is a distinction between the combat zone and the rear (support) area.

In 2003, the SDF also became involved in Iraq due to the passage of the Iraq Special Measures Law; on its face, this law allowed the SDF to support the United States in noncombat operations. Over the course of four years, this law allowed SDF troops to be deployed to a country under occupation where some small-scale fighting still continued, with the SDF allowed only to use arms in limited defensive situations. As a result, foreign troops needed to protect the SDF troops in Iraq. Following the expiration of this Anti-Terrorism law in 2007, the Japanese cabinet again submitted a bill to continue their refueling operations to fulfill their responsibility in the international war on terror. This renewal of the law was met with great debate in Japan with some claiming it violated Article 9. Then Prime Minister Fukuda defended renewing the bill, stating that the area in which the SDF had been operating was a non-combat zone and, as a result, deployment of forces did not violate Article 9 of the Constitution.

Strict limitations are in place for the SDF when deployed to a foreign country. In order to balance the interests of Article 9 with the international pressure Japan faces from the world, the U.N. Peacekeeping Operations Law includes five principles developed for Japan’s participation. The first three principles are preconditions to the SDF becoming involved: (1) a cease fire must currently be in effect and maintained actively, (2) the host country or countries have

---

133 Id. at 1603.
134 Id.
135 Id.
136 Southgate, supra note 22, at 1621.
137 Id.
138 Umeda, supra note 19, at 22.
139 Southgate, supra note 22, at 1600-1.
140 Umeda, supra note 19, at 25-6.
141 Id. at 26.
142 Gibbs, supra note 5, at 159.
143 Id.
144 Id.
145 See Southgate, supra note 22, at 1621 (noting that the size, composition, etc. of the SDF was defined by the law).
146 See Southgate, supra note 22 (discussing the principles for participation).
to give their consent before the Self Defense Force can participate, and (3) the United Nations must be impartial in terms of the conflict.\textsuperscript{147} The remaining two procedural principles include the following: (4) the use of arms should be limited only to cases of necessity or in self defense, and the United Nations may not order the use of arms; and (5) should one of the three preconditions be suspended or terminated, the participation of the SDF will end.\textsuperscript{148}

Additional developments towards remilitarization have included declarations in 2002 by former Prime Ministers stating that Japan could own nuclear weapons despite Article 9.\textsuperscript{149} In addition, the Diet approved the creation of a defense ministry in 2006.\textsuperscript{150} This full-fledged Ministry of Defense was the first one in Japan since World War II.\textsuperscript{151} In addition, by 2007, Japan ranked sixth in the world in military spending, reaching a total of $41.75 billion on military spending that year.\textsuperscript{152} It appears the SDF will likely continue its progression, changing from a force of self-defense to a full military irrespective of the constitution and Article 9.\textsuperscript{153}

E. **Preemptive Self Defense in the War on Terror**

Claims by the United States in 2002 to a preemptive right of self-defense led to concern and criticism from international lawyers.\textsuperscript{154} As previously discussed, the concern is that preemptive self-defense legitimizes sudden, massive military actions that occur with no warning in the absence of war, such as Pearl Harbor.\textsuperscript{155} Following the United States’ broad claim of a right to preemptive self-defense, many other states took it upon themselves to claim the same right.\textsuperscript{156} Some of these states even possess nuclear weapons.\textsuperscript{157} As a major player in the international arena, when the United States claims a certain right, there can be major implications for customary international law to be changed as a result.\textsuperscript{158}

While the Bush administration is typically associated with the idea of preemptive self-defense, signs appeared in previous administrations toward this idea, beginning with the Reagan administration.\textsuperscript{159} For example, in the National Security Decision Directive 207, it was stated that the United States must effectively

\textsuperscript{147} Southgate, supra note 22, at 1631.
\textsuperscript{148} Id.
\textsuperscript{149} Kaufman, supra note 108, at 267.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Southgate, supra note 22, at 1633.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 525-6.
\textsuperscript{159} Id. at 527.
protect its citizens, property, and interests. In addition, former Secretary of State Shultz argued that limited military action should be utilized to handle terrorist threats while still at a manageable size, and a nation that had been attacked by terrorists should be permitted to use force to either prevent or preempt any further attacks. During the Clinton Administration, it was suggested that a preemptive right existed, but new security documents gave attention to terrorism and became more reactive in line with Article 51 of the UN Charter. However, the strategy for security during the Clinton administration in 2000 was for the United States to reserve the right to act militarily in self-defense through striking at terrorist bases, as well as those states that sponsor, support, or assist terrorists.

Following the attacks of 9/11, President Bush stated in June 2002 that it was necessary to attack the enemy, disrupt their plans, and confront threats to our nation’s security before they could emerge. By September 2002, the new U.S. security strategy clearly stated and expanded to claim a right to preemptive action. In a world in which weapons of mass destruction are a reality, the United States needs the ability to defend itself against enemies through preemptive means. Former national security adviser Condoleezza Rice stated that this is not a green light to attack other nations, and the instances where a preemptive right exists will be small. By 2006, the National Security Strategy moderated the broad claims of this right by the United States; however it did retain preemptive force.

The UN Charter states in Article 51 that the use of force is authorized if an armed attack occurs:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it

161 Reisman & Armstrong, supra note 154, at 528.
162 Id. at 529.
163 Id. at 530.
164 President George W. Bush, Commencement Address at the United States Military Academy at West Point, (Jun. 1, 2002), available at http://www.presidentialrhetoric.com/speeches/06.01.02.html.
165 Reisman & Armstrong, supra note 154, at 530.
166 Id.
167 Id. at 531.
168 Id. at 531-2.
deems necessary in order to maintain or restore international peace and security.¹⁶⁹

The UN’s stance on the use of force is presented as one of two things: either the use of force is lawful because it is used in self-defense or it is not used in self-defense and is therefore unlawful.¹⁷⁰ Under the UN Charter, the state must suffer an “armed attack” before the right to force through self-defense arises.¹⁷¹ In addition to the situation of an armed attack, the Caroline incident validates anticipatory self-defense.¹⁷² In the Caroline case, a British military unit secretly entered the United States and destroyed an American ship, the Caroline, which had been assisting Canadians who were fighting against British rule.¹⁷³ The attack resulted in the loss of the ship and the deaths of two Americans.¹⁷⁴ The British informed American officials the ship was destroyed in self-defense, and the United States demanded the British justify this self-defense claim by showing it was instant, overwhelming, there were no other means, and no time to deliberate in taking the action.¹⁷⁵ From Caroline, states have not only the confirmed right to self-defense, but there are clear criteria for when anticipatory self-defense may be used as well.¹⁷⁶ The Caroline test requires a country to show that force is necessary because of an imminent threat, and that the response to the threat is proportionate.¹⁷⁷

Preemptive self-defense, which is discussed in the UN Charter, differs from anticipatory self-defense.¹⁷⁸ Preemptive self-defense is the claim that a state is entitled to use high levels of violence unilaterally, without prior authorization to stop a development that has not yet become threatening or operational, but that if allowed to continue could be seen by the preemtort as needing to be neutralized at a higher and potentially unacceptable cost.¹⁷⁹ Anticipatory self-defense means that an imminent threat has been discovered, and that there is “palpable evidence of an imminent attack.”¹⁸⁰ In contrast, preemptive self-defense is seeing only a contingency or possibility of a threat.¹⁸¹ In order to reach the

¹⁶⁹ U.N. Charter art. 51.
¹⁷⁰ Reisman & Armstrong, supra note 154, at 525.
¹⁷¹ U.N. Charter art. 51.
¹⁷⁴ Id.
¹⁷⁵ Id.
¹⁷⁶ Rouillard, supra note 164.
¹⁷⁷ Tait, supra note 165.
¹⁷⁸ Reisman & Armstrong, supra note 154, at 526.
¹⁷⁹ Id.
¹⁸⁰ Id.
¹⁸¹ Id.
threshold for preemptive self-defense, one would simply need to show the mere threat or possibility of attack at some future point.\textsuperscript{182}

A UN Panel on Threats, Challenges and Change agreed with those that believed there should be a less strict requirement of an “armed attack” in order for self-defense to be justified.\textsuperscript{183} The need for a less strict requirement arises in situations where there is a threat that although not imminent, it is claimed to be very real.\textsuperscript{184} An example of such a threat exists in States that have the capability to make nuclear weapons.\textsuperscript{185} Since Article 51 handles situations of armed attack, not imminent threats, it appears the UN panel has attempted to reconcile the United States claims to pre-emptive self-defense.\textsuperscript{186} The ICJ has clearly stated that a State that believes it is the victim of an “armed attack” must declare its opinion that it has been attacked.\textsuperscript{187} Customary international law does not permit another State to act in collective self-defense on its own opinion of the situation.\textsuperscript{188}

Those who agree with the idea of preemptive self defense believe it is necessary due to the evolution of weaponry over the years, since countries have weapons capabilities that can be rapid and destructive with very little or no warning.\textsuperscript{189} In response, critics of preemptive self-defense caution that assessments of a situation will vary based on the country analyzing the issues.\textsuperscript{190} While one country may see their acts as preemptive self-defense to a serious threat, another country may look at the same situation as a serious misjudgment due to differences in cultures and values.\textsuperscript{191}

The UN Security Council has remained silent on preemptive self-defense rights, evidenced by not showing support (or nonsupport) of the United States’ preemptive involvement in Iraq, perhaps because the United States could veto any resolution as a permanent member of the council, and not so much because the Security Council believed other members shared the same views.\textsuperscript{192} Prior to the invasion of Iraq, President Bush sought the authorization of the Security Council, but he failed to receive authorization.\textsuperscript{193} Since 9/11,

\textsuperscript{182} Id. at 526.
\textsuperscript{184} See id. (noting that it becomes more difficult to apply the Caroline criteria where there is only a threat of use of force).
\textsuperscript{185} Id.
\textsuperscript{186} Reisman & Armstrong, supra note 154, at 532-33.
\textsuperscript{187} Id. at 533.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 526.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Reisman & Armstrong, supra note 154, at 537.
the Security Council’s view is that any state or non-state actor that chooses to aid, harbor, or support terrorists would be accountable.\textsuperscript{194} Since the United States made their claim to preemptive self-defense, many other governments debated this right, some choosing to support the mission in Iraq and others refusing to participate in Iraq.\textsuperscript{195}

Of the states participating in Iraq, Japan maintained troops in Iraq starting in 2003, although their role involved helping in non-combat operations, such as humanitarian and construction projects.\textsuperscript{196} The SDF assistance was geared toward helping the Iraqi people, focusing on issues such as water supply, medical, reconstruction of facilities, and transportation.\textsuperscript{197}

In 2003, Japan’s Defense Minister, Ishiba stated that Japan had the right to preemptive self-defense.\textsuperscript{198} Since these statements were made, no Japanese officials publicly disavowed the claim to a right of preemptive self-defense.\textsuperscript{199} In opposition of the United States’ recognition of the right, many states and governments refuse to recognize a right to preemptive self-defense or the claim as being indicative of international law.\textsuperscript{200} While claims of preemptive self-defense are not compatible with recent ICJ decisions on the use of force for self-defense, it appears self-defense rights relaxed only for the war against terrorism.\textsuperscript{201} Some remain concerned that justifying Iraq under a claim of a right to preemptive self-defense leads to the risk that less law-abiding states may take it as permission to use aggressive force.\textsuperscript{202}

III. ARGUMENT

A. INTERPRETATIONS OF ARTICLE 9 HAVE SHOWN JAPAN IS WITHIN ITS CONSTITUTIONAL RIGHTS TO HAVE A SELF DEFENSE FORCE AND PARTICIPATE IN PREEMPTIVE SELF DEFENSE

Legislators in Japan have stated that creating and maintaining the Self Defense Force (“SDF”) is allowable under Article 9 because war is an aggressive act.\textsuperscript{203} The Japanese developed a SDF based on their inherent right of self-defense.\textsuperscript{204} The Japanese government maintains that their actions and laws passed in support

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{194} Reisman & Armstrong, supra note 154, at 538.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Reisman & Armstrong, supra note 154, at 540.
\item \textsuperscript{197} JAPAN DEFENSE AGENCY, OVERVIEW OF JAPAN’S DEFENSE POLICY 6 (May 2005), available at http://www.mod.go.jp/e/publ/w_paper/pdf/2006/english.pdf.
\item \textsuperscript{198} David McNeill, Japan Warns That It Will Attack if North Korea Aims Missile, THE INDEPENDENT (London), Sept.15, 2003.
\item \textsuperscript{199} Kaufman, supra note 108, at 267.
\item \textsuperscript{200} Reisman & Armstrong, supra note 154, at 547.
\item \textsuperscript{201} Id. at 548.
\item \textsuperscript{202} Id. at 549.
\item \textsuperscript{203} Southgate, supra note 22, at 1602.
\item \textsuperscript{204} Id.
\end{itemize}
\end{footnotesize}
of the war on terror do not violate the Japanese constitution because the policy of Japan remains defense-oriented.\textsuperscript{205}

The Japanese Supreme Court repeatedly refuses to take a stance on the constitutional validity of the SDF, despite numerous opportunities.\textsuperscript{206} As a result, it seems to suggest that the Supreme Court believes there is a “permissible purpose for the SDF in the defense of Japanese sovereignty.”\textsuperscript{207} General McArthur himself stated that the SCAP had not intended “the demilitarization of Japan to prevent any and all steps for preservation of the nation.”\textsuperscript{208} As a sovereign country, Japan “possessed the inherent right of self-preservation.”\textsuperscript{209}

The 1997 Guidelines created a role for the SDF beyond Japan into areas surrounding Japan.\textsuperscript{210} Based on the 1997 Guidelines, the term “areas surrounding Japan” is not a reference to geography, but rather it is determined by the situation.\textsuperscript{211} The definition of “situation” was also described as any events that “will have an important influence on Japan’s peace and security.”\textsuperscript{212} Similar to the stance taken by the United States, limited military action should be used to handle terrorist threats while still manageable and to preempt any further attacks rather than waiting to absorb the first blow.\textsuperscript{213}

The Anti-Terrorism Special Measures Law were legally passed in the Japanese legislature; in keeping within the bounds of Article 9, the law allowed Japan to provide SDF to the United States within a scope that kept them apart from the use of force.\textsuperscript{214} While SDF members may use weapons in their own defense or in unavoidable situations, their primary duties are support activities and not combat operations.\textsuperscript{215}

\textbf{B. A Right to Preemptive Self Defense Has Been Claimed and Adopted by Numerous Countries}

Numerous coalition partners joined the United States in the fight on terror and in claiming a right to preemptive self-defense.\textsuperscript{216} Australia is one coalition partner of the United States, and Australia defends the preemptive strike doctrine against terrorism as an

\textsuperscript{205} Umeda, supra note 19, at 28.
\textsuperscript{206} Southgate, supra note 22, at 1629.
\textsuperscript{207} Id.
\textsuperscript{208} Southgate, supra note 22, at 1612.
\textsuperscript{209} Id.
\textsuperscript{210} The Guidelines for U.S.-Japan Defense Cooperation (September 1997).
\textsuperscript{211} Id.
\textsuperscript{212} Southgate, supra note 22, at 1617.
\textsuperscript{213} See Reisman & Armstrong, supra note 154, at 528 (noting that a country has the responsibility to protect its citizens’ property and interests).
\textsuperscript{214} Southgate, supra note 22, at 1620.
\textsuperscript{215} Southgate, supra note 22, at 1620-1.
\textsuperscript{216} See generally Reisman & Armstrong, supra note 154, at 538-546. (describing actions taken by various countries).
interpretation of the UN Charter Article 51. The Defense Minister of Australia stated that when an attack is imminent, a state it not required to wait and take the first blow (aka anticipatory self-defense). However, when facing the non-state actors (terrorists) operating in a very non-traditional manner from multiple bases, the indicators and warning that one would receive in a traditional attack are not there. The British Foreign Secretary also supported preemption stating that in light of the 9/11 attacks on the United States, countries learned that it is better to take action preemptively rather than waiting until that threat or attack materializes. In fact, operations occurring overseas may be the best means of self-defense because the country is not waiting for the problem to arrive on their territory.

Even non-U.S. coalition partners criticizing the preemption policy have claimed they believe they are entitled to the right of preemption. For instance, China has been a vocal critic of the United States’ involvement in the war on terror, believing that it utilizes judgments that are subjective and easily abused in order to start war. However, the Chinese government appeared to say that, in the context of Taiwan, they themselves have a limited right of preemptive attack. France is another vocal critic of the Iraq war that has announced a defense policy that allows them to take preemptive action against threats outside their borders.

C. Japan Has Not Violated Article 9 in Assisting the U.S. in the Preemptive War on Terror

In dispatching SDF to fight in the war on Terror, Japan’s Special Measures law allowed its SDF to conduct limited operational activities. The intent in passing the Anti-Terrorism Special Measures Law was to allow Japan to assist the United States with support activities, including medical care, supply, repairs, and servicing. All support services by Japanese forces were to occur in areas that are non-combat zones and where the security and safety of

217 Reisman & Armstrong, supra note 154, at 538.
218 Id.
219 Id.
221 Reisman & Armstrong, supra note 154, at 542.
222 See generally id. at 544 (discussing comments made by officials in other countries such as India and China).
223 Id.
224 Id.
225 Kaufman, supra note 108, at 269.
227 Southgate, supra note 22, at 1604.
forces can be assured.\textsuperscript{228} Japan’s contributions to the efforts of its allies to fight terrorism leads to “endeavors to prevent and eradicate international terrorism in order to ensure the peace and security of the international community including Japan itself.”\textsuperscript{229} The Prime Minister of Japan stated that the fight against terrorism is a genuine concern of Japan and all other countries.\textsuperscript{230} Japanese officials feel that with the “proliferation of terrorists,” Japan must become more engaged in the international community.\textsuperscript{231}

IV. CONCLUSION

This Article began by discussing the history of Article 9 of the Japanese Constitution, including Japan’s surrender following World War II through the present day state of Article 9 of the Japanese Constitution.\textsuperscript{232} Interpretations of Article 9 were also examined, including the ways in which Japan has justified its creation of a Self Defense Force (“SDF”).\textsuperscript{233} This Article then turned to the evolution of U.S.–Japan Security Arrangements and the Japanese SDF.\textsuperscript{234} The Article looked at Japan’s role in the war on terror, including the role of preemptive self-defense.\textsuperscript{235} Finally, the Article concluded that Japan has not violated Article 9, based on its interpretations of its laws and its actions in the war on terror.\textsuperscript{236}

Japan’s creation of the SDF, and the SDF involvement in Iraq, did not exceed the bounds of Article 9. Due to the lack of combat duties for Japanese troops, Japan deployed to foreign areas where they received permission from the host country, and Japan is allowed to be involved in preemptive conflicts. Article 9 has been interpreted to allow the Japanese to have a Self Defense Force and to act in their self defense when the situation requires it, whether there has been an armed attack or not. As an U.S. ally, Japan should share in the alliance burden by assisting with the war on terror. With the advent of weapons of mass destruction and nuclear weapons, the battlefield has changed and deadly attacks can be mounted against a country with little or no notice. The war on terror is a war on a non-traditional enemy, a war against extremist groups, and not against any one particular country. In addition, the lines of the battlefield have been blurred, with terrorists using tactics and weapons at any time and any place. While no direct threats have been made on Japan, terrorists often strike with little warning or outside

\textsuperscript{228} Basic Plan Regarding Response Measures Based on the Anti-Terrorism Special Measures Law (Nov. 16, 2001), http://www.kantei.go.jp/foreign/policy/2001/antiterrorism/1116keikaku_e.html.


\textsuperscript{230} Id.

\textsuperscript{231} Kaufman, supra note 108, at 269.

\textsuperscript{232} See supra notes 24-53 and accompanying text.

\textsuperscript{233} See supra notes 54-79 and accompanying text.

\textsuperscript{234} See supra notes 80-112 and accompanying text.

\textsuperscript{235} See supra notes 113 to 151 and accompanying text.

\textsuperscript{236} See supra notes 152 to 200 and accompanying text.
traditional war guidelines. Due to the various interpretations of Article 9, it may be time for Japan to amend their constitution to silence the critics who believe they should stay out of world conflicts. If Japan wants to be seen as a more "normal" nation, with the ability to lend a hand to efforts against terrorism, amending the constitution to allow non-aggressive involvement would be an effective step forward for the nation.