

“The Advisory Panel on
Reconstruction of the Legal Basis for Security”
Outline of the Report

May 15, 2014

The Advisory Panel on Reconstruction of the Legal Basis for Security

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Introduction

In May 2007, then-Prime Minister Shinzo Abe established the Advisory Panel on Reconstruction of the Legal Basis for Security. The Government has maintained to date the position that the right of collective self-defense cannot be exercised, despite the fact that Japan possesses the right of collective self-defense as clearly stipulated in Article 51 of the U.N. Charter and the Japan-U.S. Security Treaty.

Prime Minister Abe presented to the Advisory Panel at the time the following “four cases” for examination. The “four cases” are scenarios that are subject to particularly significant constitutional constraints, and, unless Japan is able to respond appropriately, are likely to obstruct the maintenance of Japan’s security, trust in the Japan-U.S. alliance and Japan’s proactive contribution for international peace and stability.

- ① Defense of U.S. vessels on the high seas
- ② Interception of a ballistic missile that might be on its way to the United States
- ③ Use of weapons in international peace operations
- ④ Logistics support for the operations of other countries participating in the same U.N. PKO and other activities

The report was submitted in June 2008.



Introduction (Continued)

The security environment surrounding Japan has changed dramatically even in the few years since the Panel submitted its previous report. This has necessitated serious consideration on Japan's security policy towards the maintenance and building of peace in the international community. Moreover, the Japan-U.S. alliance, the linchpin of stability and prosperity in the Asia-Pacific region, is faced with an even greater responsibility.



In view of these changes in the situation, Prime Minister Abe resumed the meetings of the Panel in February 2013. The Panel was instructed to reexamine the legal basis for security, what Japan should do in order to maintain the peace and security of Japan, including for the most effective operation of the Japan-U.S. security arrangements, taking into account the changes over the past four and a half years as well as potential changes in the security environment in the future.

This examination was not limited to the “four cases” described in the 2008 report, but covered the followings:

- What concrete actions Japan should take to maintain the peace and security of Japan and to ensure its survival
- What ideas should underlie the Government's constitutional interpretation
- How the Constitution should be interpreted
- How the domestic legal system should be structured

I . Current Constitutional Interpretation and Its Limits

1. Development of the Constitutional Interpretation and Fundamental Principles

(1) Development of the Constitutional Interpretation

The interpretation of Article 9 of the Constitution: **Not consistent throughout the postwar period**

Immediate aftermath of the War

1950s~1960s

1970s~

• As a result of not recognizing any war potential and the right of belligerency of the state in paragraph 2 of Article 9, **Japan renounced both war as an exercise of the right of self-defense and the right of belligerency.**

- The Constitution, while renouncing war, has not renounced fighting for self-defense.
- In the case in which a country with which Japan shares especially close relations is subjected to an armed attack, Japan does not possess the right of collective self-defense in the sense of Japanese forces going to the attacked country and protecting that country.

The Supreme Court ruling on the so-called Sunagawa case (1959)

- There is nothing in Article 9 of the Constitution which denies the inherent right of self-defense of Japan as a sovereign nation.
- It is only natural for our country, in the exercise of powers inherent in a state, to take measures of self-defense necessary to maintain its peace and security and to ensure its survival.

- Based on the provisions of the Preamble and Article 13, **the Constitution does not prohibit Japan from taking measures of self-defense necessary to maintain its peace and security and to ensure its survival.**
- These measures should be limited to the minimum extent necessary.
- The exercise of the right of collective self-defense exceeds that extent and is not permitted under the Constitution.

This interpretation of the Constitution held by the Government, that the exercise of the right of collective self-defense is not permitted at all under the Constitution, has not been changed until today. It needs to be borne in mind that whether Japan can truly protect the lives of its people through only the right of individual self-defense, as the limit of the minimum extent necessary, has not been demonstrated.

The reason for the literal interpretation that individual self-defense and collective self-defense are clearly divided and only the right of individual self-defense is permitted under the Constitution has not been presented.

I . Current Constitutional Interpretation and Its Limits

(2) Fundamental Principles of the Constitution Pertaining to the Interpretation of Article 9 of the Constitution

The fundamental principles of the Constitution which should be the most important foundation in considering the interpretation of Article 9 of the Constitution are as follows:

Right to Live in Peace and Right to Life, Liberty and the Pursuit of Happiness, as the foundation of Basic Human Rights

The protection of the right to live in peace (the Preamble of the Constitution) and the right to life, liberty and the pursuit of happiness (Article 13) requires as a precondition that Japan is not invaded and maintains its independence, and is incumbent on the maintenance and exercise of appropriate force for self-defense for repelling attacks and threats from the outside.

Popular Sovereignty

The “principle of popular sovereignty” cannot be realized unless the survival of the sovereign people is ensured. This requires that the peace and security of Japan is maintained, and its survival is ensured.

Principle of International Cooperation

Based on the spirit of the principle of international cooperation as stipulated in the Constitution (both in the Preamble and Article 98), participation in international operations is an area in which Japan should engage in most proactively.

Pacifism

Japan’s pacifism should be interpreted as based on the principle of international cooperation which is also the fundamental principle of the Constitution. Accordingly, pacifism in the Constitution should be interpreted from an international perspective and not from a self-centered view and thus is beyond the passive form of pledging not to disturb peace, and demands proactive actions to realize peace.

I . Current Constitutional Interpretation and Its Limits

2. Changes in the Security Environment Surrounding Japan

① Technological progress and the changing nature of threats and risks

As weapons of mass destruction and their means of delivery are proliferating, becoming increasingly sophisticated, and becoming smaller, and cross-border threats such as international terrorism and cyber-attacks are increasing, an incident in any region of the world could have influence on the peace and security of Japan immediately.

② The change in the inter-state power balance

Tensions have been rising especially in the Asia-Pacific region. Territorial and other issues act as destabilizing elements. The rise of China's influence is evident. It is imperative that Japan fulfills an even greater role for ensuring peace and stability in the region, as the risks have been increasing.

③ The deepened and expanded Japan-U.S. relationship

Strengthening the Japan-U.S. alliance in all areas of security is essential. Japan needs to also build trust and cooperative relations with partners inside and outside the region.

I . Current Constitutional Interpretation and Its Limits

2. Changes in the Security Environment Surrounding Japan (Continued)

④ Developments in the region related to regional frameworks, including multilateral security cooperation frameworks

A variety of cooperation frameworks, including those in the areas of politics, security, and defense (e.g. EAS, ADMM+) have developed in a multi-layered manner. Japan is required to develop and improve its institutional, financial, and personnel bases to enable Japan to participate more proactively in a wide range of cooperation activities and fulfill a leading role.

⑤ The increasing number of serious incidents that the whole international community ought to address

The importance of conflict management, peace building and reconstruction assistance with the U.N. at the core is increasing, and international cooperation is further required.

⑥ The SDF's operations in the international community

The achievements and capabilities of the SDF are highly appreciated inside and outside the country. It is necessary that the SDF fulfill an even greater role in such areas as reconstruction assistance, humanitarian assistance, education, capacity-building and plan formulation.



Considering the scale and speed of the changes in the strategic environment, Japan is now facing a situation where adequate responses can no longer be taken under the constitutional interpretation to date in order to maintain the peace and security of Japan and realize peace and stability in the region and in the international community.

I . Current Constitutional Interpretation and Its Limits

3. Case Examples of Concrete Actions Japan Should Take

In addition to the “four cases” examined in 2008, there is a need to allow Japan to take concrete actions in response to the following cases. Cases below are not intended to suggest that these are the only cases that should be constitutional and feasible.

- ① Measures to be taken in case of **contingency in Japan’s neighboring areas**, namely ship inspections and repelling of attacks against the U.S. vessels etc.
- ② Support to the **United States when it is under an armed attack**
- ③ Minesweeping in maritime areas (e.g., straits) where **navigation of Japanese ships is significantly affected**
- ④ Participation in activities based on a U.N. decision when **an armed attack which significantly affects the maintenance of international order occurs**, e.g., Iraqi invasion of Kuwait
- ⑤ Measures to be taken when **foreign submarines continue sailing submerged in the territorial sea of Japan do not follow the request to leave the territorial sea and continue wandering**
- ⑥ Response in the event **an armed group conducts an unlawful act** against a vessel or civilian **in a sea area or remote island** etc. where it is difficult for Japanese authorities, including the Japan Coast Guard, to respond promptly

II . How the Constitution Should Be Interpreted

1. Paragraphs 1 and 2 of Article 9 of the Constitution

(1) Paragraph 1 of Article 9 of the Constitution

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.



- Article 9 of the Constitution makes no mention of the right of self-defense or collective security. Looking back at the historical development of international law such as the Kellogg-Briand Pact and the U.N. Charter, as well as the background to the formulation of the Constitution, it is not appropriate to interpret paragraph 1 of Article 9 of the Constitution as prohibiting without exception the threat or use of force by Japan.
- The provision of paragraph 1 of Article 9 of the Constitution should be interpreted as prohibiting the threat or the use of force as means of settling international disputes to which Japan is a party. The provisions should be interpreted as not prohibiting the use of force for the purpose of self-defense, nor imposing any constitutional restrictions on activities that are consistent with international law, such as participation in U.N. PKOs etc. and collective security measures.
- Imposing limitations on the use of weapons in U.N. PKOs etc. by reason of paragraph 1 of Article 9 is a doubly inappropriate interpretation of the Constitution, firstly in that it imposes restrictions on participation in U.N. activities, and secondly because it confuses the “use of weapons” with the “use of force.”

II . How the Constitution Should Be Interpreted

1. Paragraphs 1 and 2 of Article 9 of the Constitution

(2) Paragraph 2 of Article 9 of the Constitution

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.

Paragraph 2 stipulates that “in order to accomplish the aim of the preceding paragraph,” war potential will never be maintained. Accordingly, paragraph 2 should be interpreted as prohibiting the maintenance of war potential that could be employed in the threat or use of force in order to settle international disputes to which Japan is a party but not the maintenance of force for other purposes, namely self-defense (regardless of whether it be individual or collective) or so-called international contributions to international efforts. (This view was already expressed in the Panel’s 2008 report)



The constitutional interpretation to date

The Government’s interpretation has been that while the right of individual self-defense falls within the limit of the right of self-defense at the minimum extent necessary and is constitutional, the right of collective self-defense does not.

Even from the view of the Government to date that “these measures (necessary for self-defense) should be limited to the minimum extent necessary,” the Government’s interpretation of the Constitution which excluded the right of collective self-defense from “the minimum extent necessary,” while including the right of individual self-defense is inappropriate as it attempts to formally draw a line on “the minimum extent necessary” by an abstract legal principle. It should be interpreted that the exercise of the right of collective self-defense is also included in “the minimum extent necessary.”

- A state can protect its security better by collaborating with trustworthy countries and assisting each other.
- Enabling the exercise of the right of collective self-defense would strengthen relations with other trustworthy countries and would lead to preemptively diminishing the potential for conflict by enhancing deterrence.

II . How the Constitution Should Be Interpreted

2. Right of Self-Defense Permitted under the Constitution

Right of Individual Self-Defense

- As long as the three requirements ((1) there is an imminent unlawful infringement against Japan; (2) there is no other appropriate means available to repel this infringement; and (3) the use of force is limited to the minimum extent necessary) are fulfilled, there are no restrictions on the exercise of the right of individual self-defense.

※ Its exercise requires a decision based on careful and speedy judgment on necessity and proportionality.

Right of Collective Self-Defense

- When a foreign country that is in a close relationship with Japan comes under an armed attack and if such a situation has the potential to significantly affect the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent from the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and security even if Japan itself is not directly attacked.
- With regard to whether a certain situation would fall under such a case, the Government should take responsibility for making a decision, taking the following points into consideration comprehensively (not appropriate to set out geographical limitations on the location for activities of SDF units) :
 - ① whether there is a high possibility the situation could lead to a direct attack against Japan
 - ② whether not taking action could significantly undermine trust in the Japan-U.S. alliance, thus leading to a significant loss of deterrence
 - ③ whether international order itself could be significantly affected
 - ④ whether the lives and rights of Japanese nationals could be harmed severely
 - ⑤ whether there could otherwise be serious effects on Japan

※ The right of collective self-defense is generally interpreted in international law as the right to use force to repel an armed attack against a foreign country that is in a close relationship with one's country although one's own country is not under attack.

II . How the Constitution should be Interpreted

2. Right of Self-Defense Permitted under the Constitution (Continued)

Right of Collective Self- Defense

- ✘ In the case that Japan would pass through the territory of a third country, the Government should make it a policy to obtain the consent of that third country.*
- ✘ The approval, either prior or ex post facto, of the Diet should be required.*
- ✘ The exercise of the right of collective self-defense by Japan should be discussed and approved by the National Security Council under the leadership of the Prime Minister, and the Cabinet is required to make the decision in the form of a Cabinet Decision.*
- ✘ Given that the right of collective self-defense is a right and not an obligation, it is obvious that even in cases where that right could be exercised, a policy decision not to exercise it could be made.*

Note:

- (1) It could constitute a violation of international law to justify cases that should originally be subjects of exercise of the right of collective self-defense by “expanding” the concept of the right of individual self-defense or law enforcement, based on a concept unique to Japan. It would allow spreading “justice” that is unilaterally defined by each country and not in conformity with international law; therefore, such expansion is in practice a dangerous idea.
- (2) It is necessary to continue examining what kind of institutional framework would be necessary to respond to a cyber-attack, taking note of debates in the international community.

II . How the Constitution Should Be Interpreted

3. Participation in Collective Security Measures of the U.N. Entailing Military Measures

Collective Security Measures of the U.N.

● Collective security measures of the U.N. will not constitute the use of force as means of settling international disputes to which Japan is a party and therefore they should be interpreted as not being subject to constitutional restrictions.

✘ *Participation in such operations should be decided carefully, based on comprehensive examination on each individual case and the degree of political significance Japan's participation would have.*
✘ *Participation in U.N. collective security measures entailing military measures should require approval, either prior or ex post facto, by the Diet.*



- The constitutional interpretation of this Panel has been derived from a literal interpretation of the provisions of the Constitution.
- The Constitution makes no express provisions with regard to the right of individual self-defense or the right of collective self-defense. The exercise of the right of individual self-defense has also in the past been recognized, not by the Government's amendment of the Constitution, but by the adjustment of constitutional interpretations.
- In view of these facts, it should also be possible, by the Government setting out a new interpretation in an appropriate manner, to make a decision recognizing that the exercise of the right of self-defense to the minimum extent necessary encompasses the right of collective self-defense in addition to the right of individual self-defense. The observation that the amendment of the Constitution is necessary therefore does not apply. Similarly, with regard to Japan's participation in collective security measures of the U.N., this could also be enabled by clarification of a new interpretation of the Constitution by the Government in an appropriate way.

II . How the Constitution Should Be Interpreted

4. Theory of So-called “Ittaika’ with the Use of Force”

Theory of So-called “Ittaika’ with the Use of Force”

● “Ittaika*” with the use of force is a concept unique to Japan. There is no clear basis in positive law, either international law or domestic law, for such theory. The theory of “ititaika” with the use of force has arisen out of discussions that are based on a strict view that errs on the side of caution with regard to new activities, mindful of constitutional restrictions. Accordingly, in today’s world, where Japan has accumulated experience in international peace cooperation activities, the theory of so-called “ititaika” with the use of force has now served its purpose and should be discontinued. Instead it should be dealt with as a matter of policy appropriateness.

*The concept whereby even though Japan’s logistics support, such as supply, transportation and medical services, does not in itself constitute the use of force, such support is deemed to constitute the “use of force” prohibited under Article 9 of the Constitution if it is provided in such a manner that forms an “integral part” of the use of force by the other countries to which the support is provided, in view of factors such as closeness of the support to the use of force by those countries.

✕*Decisions on what logistics support is to be provided under what circumstances should be carefully considered by the Cabinet.*

II . How the Constitution Should Be Interpreted

5. Cooperation and the Use of Weapons in U.N. PKOs etc.

The use of weapons to come to the aid of geographically distant unit or personnel under attack (so-called “kaketsuke-keigo”) or to remove obstructive attempts against its missions

- There is no country that interprets the use of weapons recognized by the international standards of U.N. PKOs as “use of force” in international relations. The use of weapons by the SDF should be regarded as not constituting the use of force prohibited under Article 9 of the Constitution, even if the weapons are used for coming to the aid of geographically distant unit or personnel under attack (“kaketsuke-keigo”) or to remove obstructive attempts against its missions.

- ✧ *In complex U.N. PKOs in recent years, such activities as maintenance of security and protection of civilians have become increasingly important. Thus when making concrete considerations in addition to enabling the use of weapons for so-called “kaketsuke-keigo” or to remove obstructive attempts against its missions, the implementation of such activities should also be legally made possible.*
- ✧ *Given discrepancies with the actual situation of U.N. PKOs and the diversifying nature of missions and actors of U.N. PKOs, the so-called Five Principles on Japan’s Participation in U.N. PKOs needs to be examined in view of its revision from the perspective of what is necessary in enabling Japan’s more active participation in international peace cooperation.*

II . How the Constitution Should Be Interpreted

6. Protection and Rescue etc. of Japanese Nationals Abroad / International Security Cooperation

Use of Weapons
in Protection
and Rescue etc.
of Japanese
Nationals
Abroad and in
International
Security
Cooperation

- Under international law, the protection and rescue of nationals abroad are permitted as activities based on the consent of the territorial state, in cases where such consent has been granted. The use of weapons when engaging in rescue activities or removing obstructive attempts against its mission as a part of the protection and rescue of nationals abroad are not in the first place the “use of force” in cases where the territorial state has given its consent and are no more than efforts to supplement or substitute security activities of the territorial state and therefore should be interpreted as not being restricted constitutionally.
- In addition to protection and rescue of nationals abroad, international security cooperation, such as activities that are based on the consent of the territorial state and that are conceived as supplementing a part of the activities of the police or other authorities of that state which should be conducted as part of their mandate to restore or maintain law and order, and anti-piracy activities based on universal jurisdiction, does not constitute the “use of force” and should be interpreted as not restricted constitutionally.

II . How the Constitution Should Be Interpreted

7. Response to an Infringement that Does Not Amount to an Armed Attack

Response to an
Infringement
that Does Not
Amount to an
Armed Attack

- Action to the minimum extent necessary by the SDF to repel an infringement that does not amount to an armed attack should be permitted under the Constitution to the extent it is legal under international law.

✘ *Under the current provisions of the SDF Law, there is a possibility of facing difficulty in bringing a situation under control due to gaps arising in authority or time between peacetime and situations where respective actions are taken or a Defense Operation Order is issued.*

✘ *There is a growing need for the response to infringements that do not amount to an armed attack in the current international community, and thus it is necessary to enhance the legal system within a scope permitted under international law to enable a seamless response including the use of force proportionate to various situations.*

III. Structure of Domestic Legislation

In order to give actual meaning to the new concepts stated above, it is essential to develop corresponding domestic legislation etc. It is the strong expectation of the Panel that the Government will consider this report earnestly and proceed to take necessary legislative measures.

- Domestic legislation need be developed in such a way as to enable the exercise of the right of collective self-defense, participation in collective security measures of the U.N. that entail military measures, and a more proactive contribution to U.N. PKOs in accordance with the Constitution.
- In addition to ensuring a seamless response in any given situation and sufficiently ensuring the justness of procedural aspects, including the confirmation of civilian control, it is necessary to be able to adequately respond by prioritizing procedures depending on the nature of the situation, in particular those situations that require a rapid issuance of orders for actions.
- For this purpose, broad examination of a number of laws must be implemented, including the SDF Law, the Armed Attack Situation Response Law, the Law Concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan, and the PKO Law. Such examination will have to take into account the provisions of various special measures laws that relate to the activities etc., of the SDF, the current security environment, and requirements in line with U.N. standards.